B. Defendant-Respondents: John. Jennings, Williams, Robbins, Van Zandt & Coe P.C., and John/Jane Does 1-10

1. The Appellate Division Did Not Sanction Attorney Misconduct.

Defendants agree with the Appellate Division that Jennings neither made a false statement nor failed to disclose a material fact to a tribunal. (R_Opp.6). According to Defendant, Jennings was unaware of his conflict with Cash until -- consistent with the RPCs -- disclosing it to the Board. (R_Opp.6-7). In addition, unlike Stagecoach, Defendants contend that the Appellate Division recognized that the Board is a "tribunal." (R_Opp.7).

Defendants agree with the Appellate Division that although Jennings did not make his disclosure before the proceedings began, or with the exact degree of specificity that Stagecoach desired, he made the disclosure in time for Cash to recuse himself, and thus Stagecoach suffered no harm. (R_Opp.7). Defendants also emphasize the Appellate Division's finding that Jennings disclosed his relationship with Cash "upon learning of the conflict." (R_Opp.7-8).

2. The Entire Controversy Doctrine Does Apply to this Matter

Defendants argue that the Appellate Division properly applied the entire controversy doctrine. (R_Opp.8). They identify a transactional nexus between

the action in lieu of prerogative writs and the present case, such that Stagecoach had to adjudicate all its present claims in the prerogative writs action. (R_Opp.8-9). Because Stagecoach did not do so, Defendants contend that any transactionally related claims not raised in the prerogative writs action are precluded here. (R_App.Div.21). According to Defendants, the entire controversy doctrine requires Stagecoach to have "s[ought] resolution of all claims in the prerogative writ action and to identify all defendants against whom any potential claim could be asserted in connection with the factual 'nexus' that gave rise to the prerogative writ action." (R_App.Div.26).

Defendants note that the entire controversy doctrine is rooted in equity and principles of fairness. (R_App.Div.22). With that in mind, Defendants argue that Stagecoach had ample opportunity to discover, investigate, and pursue its claims against them (Defendants) in the action in lieu or prerogative writs. (R_App.Div.21-23). Likewise, Defendants argue that Stagecoach could have asserted its claims in the prerogative writs action and reject Stagecoach's arguments that a legal malpractice claim cannot be asserted in a prerogative writs action. (R_App.Div.23-25)

Defendants also reject the argument that Olds exempts all attorney malpractice claims from the entire controversy doctrine. (R_Opp.9). On Defendants' read, Olds mandates that in a legal malpractice action, a party not

join its attorney in the underlying action that gave rise to the claim. (R_Opp.9).

Here, Defendants assert that the underlying action was the Board proceedings -- not the prerogative writs action.[11] (R_Opp.9-10). Because, as Defendants argue, the prerogative writs action and the Board proceedings were two separate actions, Stagecoach's failure to assert its current claims in the prerogative writs action bars them under the entire controversy doctrine. (R_Opp.10).

Defendants also disagree with Stagecoach's argument that even if the prerogative writs action is the underling action, it was incapable of providing a forum for a legal malpractice claim. (R_Opp.10). Defendants note that this argument is based on Ballantyne House Associates v. City of Newark, 269 N.J. Super. 322 (App.Div. 1993) but argue that the case is inapposite. (R_Opp.10-11). On Defendants' read, there is no case law suggesting that claims other than claims against a municipality are barred in a prerogative writs action. (R_Opp.11).

3. The Procedural Dismissal of the Complaint Was Proper.

In their final point, Defendants argue that dismissal of Stagecoach's complaint was proper under Rule 4:6-2(e). (R_Opp.12).

[11] Defendants note that Stagecoach agrees. (R_Opp.10).

a. Professional Negligence

First, Defendants argue that contrary to Stagecoach's argument, the claim for professional negligence was dismissed based on the facts as pled. (R_Opp.15). Defendants recite from the Superior Court opinions where the court(s) found that Stagecoach failed to plead an attorney-client relationship (or reliance). (R_Opp.12-15). Defendants note that ordinarily, there is no claim for legal malpractice (or professional negligence) absent an attorney-client relationship. (R_App.Div.8). Although Defendants concede that there are exceptions, such as where an attorney invites a non-client to rely on his representations, Defendants argue that this did not happen in this case. (R_App.Div.8-10).

b. Intentional Misrepresentation/Equitable Fraud

Second, Defendants argue that the Appellate Division properly dismissed the claim for intentional misrepresentation/equitable fraud. (R_Opp.16). According to Defendants, Stagecoach essentially argues only that the Appellate Division failed to recognize the facts alleged in the complaint. (R_Opp.16). In response, Defendants cite to the Appellate Division opinion and argue that the Appellate Division carefully considered all allegations in the complaint. (R_Opp.16). Defendants argue instead that Stagecoach's complaint simply lacks the specificity required to allege fraud. (R_Opp.16).

Specifically, Defendants argue that Stagecoach failed to plead "any fact" that would show Jennings's intent to misrepresent anything, rather, Jennings was unaware of the conflict until the moment he disclosed it. (R_App.Div.14-15). Defendants also argue that the claim of equitable fraud was properly dismissed because Stagecoach sought only money damages, which are not available as a remedy for equitable fraud. (R_App.Div.15).

c. Breach of Fiduciary Duty

Third, Defendants argue that the Appellate Division fully considered Stagecoach's breach of fiduciary duty claim and notes that the Appellate Division rejected Stagecoach's reliance on Albright v. Burns by expressly declining to find a fiduciary duty that could be breached. (R_Opp.17-18). Moreover, Defendants argue that this claim is duplicative of the claim for legal malpractice, which, as explained above, was properly dismissed. (R_App.Div.16-17). Defendants contend that Jennings could not have owed Stagecoach a duty because the two were direct adversaries before the Board. (R_App.Div.17). Finally, Defendants assert that breach of fiduciary duty claims are subject to heightened pleading standards, which Stagecoach did not meet. (R_App.Div.19).

d. Vicarious Liability

Defendants conclude this subheading by rejecting Stagecoach's argument that the Appellate Division "failed to acknowledge" that the issue of vicarious liability "had been fully briefed." (R_Opp.18). Defendants note that Stagecoach's brief in support of appeal did not contain "any" points about vicarious liability. (R_Opp.18). Defendants note that this issue was only raised in a reply brief and was thus waived. (R_Opp.18). Although the Appellate Division could have simply declined any comment on this point, Defendants agree with the Appellate Division's conclusion that this claim must fail because the underlying theories of direct liability had failed. (R_Opp.19-20).

IV. Discussion

A. Standard of Review

On appeal, a motion to dismiss for failure to state a claim on which relief can be granted under Rule 4:6-2(e) is reviewed de novo. Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 108 (2019). Thus, both in the first instance and on review, a court will consider whether the facts as alleged on the face of the complaint "suggest" a cause of action. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). When considering a Rule 4:6-2(e) motion to dismiss, a court must

liberally search the complaint and afford the plaintiff every reasonable inference. Ibid. A court does not concern itself with the plaintiff's ability to prove the cause of action. Id. at 772. In other words, a court should assume that the facts alleged by the plaintiff are true. See Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988).

If a court "considers evidence beyond the pleadings," a Rule 4:6-2(e) motion is converted into a motion for summary judgment. Dimitrakopoulos, 237 N.J. at 107. "The motion to dismiss on the pleadings is not, however, converted into a summary judgment motion by filing with the court a document referred to in the pleading." Pressler & Verniero, Current N.J. Court Rules, Comment 4.1.2 on R. 4:6-2 (2023). A Rule 4:6-2(e) motion may dismiss the entire complaint or certain counts therein. See Jenkins v. Region Nine Housing, 306 N.J. Super. 258 (App. Div. 1997), certif. Den. 153 N.J. 405 (1998).

Ordinarily, an issue not briefed on appeal is waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, supra, comment 3 on R. 2:6-2.

B. New Jersey Rules of Professional Conduct

This Court has "plenary authority to regulate the practice of law." Boston University v. University of Medicine and Dentistry of New Jersey, 176

N.J. 141, 144 (2003) (citing N.J. Const. art. VI, § 2 ¶ 3). Absent an express delegation of power, the "Superior Court lacks jurisdiction over the regulation of the Bar and matters that intrude on the disciplinary process." Robertelli v. Office of Atty. Ethics, 244 N.J. 470, 482 (2016).

This is not a disciplinary matter, nor has Stagecoach filed a grievance. However, because Stagecoach complains that the Appellate Division has "sanctioned" attorney misconduct and because these rules may inform an attorney's duties in tort, I offer the following explanation of the RPCs. See e.g., Innes, 435 N.J. Super. at 215-17 (attorney's breach of an ethics rule may prescribe the standard of care and scope of duty owed to a client); cf. Baxt v. Liloia, 281 N.J. Super. 50, 56 (App. Div. 1995) (attorney ethics violation does not itself establish a tort action).

RPC 1 defines "tribunal" as:

> a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.
>
> [RPC 1.0]

RPC 3.3, titled "Candor Toward the Tribunal," forbids an attorney from "knowingly participating in various activities that, in essence, pose the risk of

an unjust outcome in the light of deceptive or misleading information." Michels, New Jersey Attorney Ethics § 30:1 (2023). Among other things, the rule prohibits an attorney from knowingly making "a false statement of material fact or law to a tribunal." RPC 3.3(a)(1). A lawyer can violate this rule by affirmatively making a false statement with knowledge of its falsity. See In re Lewis, 138 N.J. 33 (1994) (RPC 3.3(a)(1) violated when a lawyer knowingly introduced a document into evidence that contained false information).

A lawyer can also violate this rule tacitly, such as where the failure to disclose a fact amounts to an assertion of the contrary fact. See In re Kasdan, 132 N.J. 99, 105 (1993) (explaining that a lawyer entering an appearance and failing to inform the judge that she was suspended from practice is a false statement of material fact for purposes of RPC 3.3(a)(1)); Crispin v. Volkswagenwerk, A.G., 96 N.J. 336, 347 (1984) ("In some situations, silence can be no less a misrepresentation than words.").[12]

The rule also prohibits an attorney from knowingly failing "to disclose to the tribunal a material fact knowing that the omission is reasonably certain

[12] This case concerned the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association ("Disciplinary Rules"). The Disciplinary Rules were replaced in 1984 with the RPCs. However, Michels, Supra § 30:2-2b discusses this case in explaining RPC 3.3(a)(1).

to mislead the tribunal" unless such disclosure is otherwise privileged or prohibited by law. RPC 3.3(a)(5). As this Court observed in In re Seelig, RPC 3.3(a)(5) codifies the notion that "[t]here are circumstances where the failure to make a disclosure is the equivalent of an affirmative misrepresentation." 180 N.J. 234, 249-50 (2004) (quoting ABA Model Rules of Professional Conduct R. 3.3 cmt. 3 (2003) (internal quotations omitted)). This can include statements where an attorney makes a less-than-full disclosure.

For example, in In re Seelig, this Court found that an attorney violated RPC 3.3(a)(5) for failing to provide the trial court with complete information in connection with a criminal representation. 180 N.J. at 258. There, a driver hit a disabled vehicle, killing two people. Id. at 238. The driver fled but was arrested and jailed. Ibid. As the prosecutor was preparing to indict him, the driver, represented by Seelig, appeared in municipal court on a summons for reckless driving, leaving the scene of an accident, and failing to report an accident. Ibid. At the municipal court appearance, Seelig told the prosecutor that his client would be pleading guilty to motor vehicle charges and that the prosecutor's presence was not necessary. Id. at 239. Seelig entered a guilty plea on the driver's behalf and the court asked Seeling whether there were any "[i]njuries or property damage." Ibid. Seelig responded: "[i]njuries." Ibid. Seelig did not mention that those "injuries" were actually the death of two

people because he intended to raise a double-jeopardy defense should the prosecutor proceed with indictable offenses. Id. at 243.

Seelig was later accused of violating, among other rules, RPC 3.3(a)(5). Id. at 237. When the disciplinary matter reached this Court, it found that Seelig had violated RPC 3.3(a)(5), reasoning that "although the record lacks a specific instance of affirmative misrepresentation by [Seelig], it contains numerous opportunities for open and forthright responses informing court personnel, the municipal prosecutor, and the municipal judge about the indictable offenses arising from his client's motor vehicle accident." Id. at 252–53.

C. The Entire Controversy Doctrine

New Jersey Court Rule 4:30A codifies the "Entire Controversy Doctrine" as follows:

> Non-joinder of claims required to be joined by the entire controversy doctrine shall result in the preclusion of the omitted claims to the extent required by the entire controversy doctrine, except as otherwise provided by *R.* 4:64-5 (foreclosure actions) and *R.* 4:67-4(a) (leave required for counterclaims or cross-claims in summary actions). Claims of bad faith, which are asserted against an insurer after an underlying uninsured motorist/underinsured motorist claim is resolved in a Superior Court action, are not precluded by the entire controversy doctrine.
>
> [R. 4:30A]

The doctrine is equitable in nature, and stems from "the general principle that all claims arising from a particular transaction or occurrence should be joined in a single action." Higgins v. Thurber, 413 N.J. Super. 1, 12 (App. Div. 2010). However, the doctrine is not to be applied "where to do so would be unfair in the totality of the circumstances and would not promote . . . conclusive determinations, party fairness, and judicial economy and efficiency." Pressler & Verniero, supra, comment 3.2 on R. 4:30A (citing Bank Leumi U.S. v. Kloss, 243 N.J. 218, 230-232 (2020)). For example, the entire controversy doctrine will not preclude a party who successfully moves to dismiss for failure to state a claim from later filing its own complaint based on the same transactional facts. See e.g., Kloss, 243 N.J. at 230-232 (supporting this conclusion with "the equitable considerations that undergird the doctrine").

In addition, to bar subsequent claims for not being joined in the earlier action, the earlier action must have been adjudicated in a forum competent to adjudicate those claims. See e.g., Higgins v. Thurber, 205 N.J. 227, 229 (2011) (probate accounting action did not preclude later action against estate's attorney for fee disgorgement). Thus, "even if the malpractice claim accrued before or during the earlier action, the client may avoid the entire controversy doctrine by demonstrating that the prior forum did not afford 'a fair and

reasonable opportunity to have fully litigated' the malpractice claim." Dimitrakopoulos v. Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, P.C., 237 N.J. 91, 99 (2019) (quoting Gelber v. Zito P'ship, 147 N.J. 561, 565 (1997)).

Except in limited circumstances, the entire controversy doctrine no longer embraces mandatory party joinder. Following this Court's 1989 decision in Cogdell v. Hospital Center at Orange, 116 N.J. 7 (1989), up until the 1998 rule amendments, the entire controversy doctrine did require mandatory party joinder. Pressler & Verniero, supra, comment 1 on R. 4:30A. Thus, during that time, all claims against all parties and potential parties stemming from one transactional occurrence had to be adjudicated in one action; failure to join a party in the first action precluded a subsequent action against that non-party for claims stemming from the original transaction or occurrence. See Cogdell, 116 N.J. at 26-27 ("this Court is now establishing a mandatory party-joinder rule similar to the mandatory claim-joinder rule . . . .").

However, in 1998, the rules were amended to eliminate mandatory party-joinder, except in certain special situations. Pressler & Verniero, supra, comment 1 on R. 4:30A. Now, in general, successive actions against a person who was not a party to the first action are not precluded. Pressler & Verniero, supra, comment 1 on R. 4:30A. Under the current rules, a nonparty to the first

action who seeks to invoke the entire controversy doctrine in a subsequent action "has the burden of establishing both inexcusable conduct and substantial prejudice." Hobart Bros. Co. v. National Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div. 2002).

The entire controversy doctrine does not require a plaintiff to join his attorney in the underlying action to later assert a legal malpractice claim against that attorney. Pressler & Verniero, Supra, comment 5.8 on R. 4:30A. For example, if a plaintiff's attorney, retained to pursue a medical malpractice action, commits legal malpractice during that representation, the plaintiff need not assert the legal malpractice claim in the underlying medical malpractice lawsuit. See Olds v. Donnelly, 150 N.J. 424, 428 (1997).[13] This Court has explained that requiring the plaintiff to assert legal malpractice claims in the underlying litigation would cause a rift between the plaintiff and his attorney while simultaneously prejudicing and/or precluding the filing of legal a legal malpractice claim. See id. at 440-41.

[13] Olds was decided in 1997 and the entire controversy doctrine then embraced mandatory party joinder. Olds, 150 N.J. at 428 (holding that "the party-joinder requirements of the entire controversy doctrine do not extend to claims of attorney malpractice"); accord Pressler & Verniero, Supra, comment 1 on R. 4:30A ("the 1998 rule amendments eliminated, except in certain special situations, mandatory party joinder under the doctrine.").

Likewise, fairness considerations may even allow a plaintiff to subsequently sue for legal malpractice when his negligent attorney is made a party to the underlying lawsuit. For example, in Sklodowsky v. Lushis, the plaintiff, on the advice of his attorney contracted to sell his land. 417 N.J. Super. 648, 650-51 (App. Div. 2011). When the sale fell through, the plaintiff-seller sued the buyer; the buyer named the plaintiff's attorney as a third-party defendant. Id. at 651. The plaintiff fired his attorney and the attorney moved for summary judgment on the third-party complaint. Ibid. The court granted the motion to dismiss, and the Appellate Division affirmed. Ibid. Eventually,[14] the plaintiff sued his former attorney for, among other things, legal malpractice in connection with the transaction. Id. at 652-53. The Appellate Division held that the entire controversy doctrine did not apply, even though the plaintiff's claim(s) against his former lawyer were germane to the

[14] In the interim, the plaintiff had filed suit against his attorney, but that suit was dismissed for lack of prosecution. Sklodowsky, 417 N.J. Super. at 652. Plaintiff also filed a third-party complaint against his attorney when named in a separate lawsuit in federal court, but the attorney was dismissed from the case on procedural grounds. Ibid. Because neither of these claims were adjudicated "on the merits," they could not serve as the prior action to preclude a subsequent action under the entire controversy doctrine. Id. at 656 ("the two dismissed lawsuits are not relevant to whether the entire controversy doctrine should be applied in this case . . . [because] the doctrine does not bar a successive action when an earlier lawsuit involving the same parties and claims has been dismissed without prejudice."). Thus, I offer only the simplified account of the facts in text.

original lawsuit and the lawyer was made a (third) party to that action. Id. at 654. The Appellate Division explained that fairness and the reasoning of Olds applied with equal force to these facts. Id. at 655-56.

D. Procedurally Dismissed Claims

1. Professional Negligence

Legal malpractice is "grounded in" negligence. Gilbert v. Stewart, 247 N.J. 421, 442 (2021) (quoting Nieves v. Off. Of the Pub. Def., 241 N.J. 567, 579 (2021). A prima facie case consists of: (1) an attorney-client relationship that creates a duty of care; (2) breach of that duty; and (3) proximate cause. Id. at 442-43 (quoting Nieves, 241 N.J. at 582). Because an attorney-client relationship is an element of legal malpractice, the cause of action is usually only available to a client-plaintiff. Pressler & Verniero, Supra, Comment 4.2.1 on Rule 4:6-2.

However, in special, "exceedingly narrow" circumstances, a non-client may pursue a legal malpractice claim. Green v. Morgan Props., 215 N.J. 431, 458 (2013). Whether one owes a duty to another is a legal question for the court to decide. Singer v. Beach Trading Co., 379 N.J. Super. 63, 74 (App. Div. 2005). To determine whether a lawyer owes a duty to a non-client, a court will balance the attorney's duties to his own clients with "the duty not to provide misleading information on which third parties foreseeably will rely."

Petrillo, 139 N.J. at 479 (citations omitted). This requires the weighing and balancing of factors, such as: "the relationship of the parties; the nature of the attendant risk; the opportunity and ability to exercise care; and the public interest in the proposed solution." Davin, L.L.C. v. Daham, 329 N.J. Super. 54, 73 (App. Div. 2000).

For example, when an attorney knowingly induces a non-client to rely on his representations, that reliance substitutes for the attorney-client relationship and a claim for malpractice will not fail for want of privity. Banco Popular No. America v. Gandi, 184 N.J. 161, 178-80 (2005). As this Court has explained, "the invitation to rely and reliance are the linchpins of attorney liability to third parties." Id. at 181.

In addition to the "reliance" theory, "[p]rivity between an attorney and a non-client is not necessary for a duty to attach 'where the attorney had reason to foresee the specific harm which occurred.'" Likewise, a lawyer may be liable to a non-client if the lawyer owes them an "independent duty." Innes v. Marzano-Lesnevich, 435 N.J. Super. 198, 213-15 (App. Div. 2014).

2. Intentional Misrepresentation/Equitable Fraud

Fraud is subject to the pleading requirements of Rule 4:5-8.[15] Every element of fraud must be proven by clear and convincing evidence. See Stochastic Decisions v. DiDomenico, 236 N.J. Super. 388, 395-96 (App. Div. 1989), certif. den. 121 N.J. 607 (1990).

The elements of common law fraud are: (1) the defendant makes a representation or omission of material fact; (2) with knowledge of its falsity; (3) intending to induce reliance on the representation or omission; (4) the plaintiff reasonably relied on the representation or omission; and (5) resulting damages. See Allstate New Jersey Ins. Co. v. Lajara, 222 N.J. 129, 147 (2015).

The elements of equitable fraud are: (1) the defendant makes a misrepresentation or omission of material fact; (2) with the intent that the representation or omission be relied upon; (3) reasonable reliance by the plaintiff on the representation or omission; and (4) damages. See Pressler & Verniero, Supra, Comment 1.2.2 on R. 4:5-8 (citing DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman, 430 N.J. Super. 325, 336 (App. Div. 2013)).

[15] In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other conditions of mind of a person may be alleged generally. R. 4:5-8.

Only equitable relief is available to remedy equitable fraud. See e.g., Daibo v. Kirsch, 316 N.J. Super. 580, 591 (App. Div. 1998).

3. Breach of Fiduciary Duty

A fiduciary relationship exists between two people when one is under a duty to act for the benefit of another on a matter within the scope of their relationship. See F.G. v. MacDonell, 150 N.J. 550, 564 (1997) (citing Restatement (Second) of Torts § 874 cmt. A (1979)). The "essence" of such a relationship is that "one party places trust and confidence in another who is in a dominant or superior position." Ibid. An attorney "owes a fiduciary duty to persons, though not strictly clients, who he knows or should know rely on him in his professional capacity." Albright v. Burns, 206 N.J. Super. 625, 632-33 (App. Div. 1986).

4. Vicarious Liability

When an employee, acting within the scope of their employment, causes injury to another, both the employee and employer may be liable in tort; the employee is directly liable and the employer vicariously liable. See Walker v. Choudhary, 425 N.J. Super. 135, 148-149. "When a plaintiff has a cause of action against two possible defendants, namely the negligent actor and the person vicariously liable for the negligent conduct, he need not join both in a single action but has the option of suing them separately in successive

actions." McFadden v. Turner, 159 N.J.Super 360, 364, 388 A.2d 244 (App.Div.1978). There can be no vicarious liability without direct liability. See Walker, 425 N.J. Super. at 152-53.

V. Analysis

A. Rules of Professional Responsibility

I submit that the Appellate Division reached the wrong conclusion with respect to Jennings's ethical violations, but I recommend that this Court state that it expresses no opinion on this portion of the Appellate Division opinion.

This is not a disciplinary matter. Other than to the extent the RPCs inform duties in tort (discussed below), I submit that Stagecoach's independent argument that the Appellate Division has blessed attorney misconduct is irrelevant. The Appellate Division (and trial court) were not concerned with disciplining Jennings, nor could they have done so. See Robertelli v. Office of Atty. Ethics, 244 N.J. 470, 482 (2016) (explaining that absent an express delegation of power, the "Superior Court lacks jurisdiction over the regulation of the Bar and matters that intrude on the disciplinary process."). However, for completeness, I discuss Stagecoach's arguments below.

1. The Appellate Division Has Not Effectively Sanctioned Attorney Misconduct.

Stagecoach argues that the "public trust has been eroded" because Jennings's conduct has gone unpunished. I disagree. Other than to the extent the RPCs inform the analysis for duty and breach, Stagecoach's arguments are simply red herrings. See e.g., Innes, 435 N.J. Super. at 215-17 (attorney's breach of an ethics rule may prescribe the standard of care and scope of duty owed to a client); cf. Baxt v. Liloia, 281 N.J. Super. 50, 56 (App. Div. 1995) (attorney ethics violation does not itself establish a tort action).

First, this is an unpublished case. Regardless of whether the Appellate Division opinion regarding Jennings's conduct and the RPCs is sound, it does not constitute binding precedent. See R. 1:36-3. Nor can the opinion even be cited by any court except to the extent the judgment is accorded preclusive effect. Ibid.

Second, although an unpublished opinion binds the parties to the present action, any "blessing" of unethical behavior is irrelevant because this was not a disciplinary proceeding. Because the complaint here was dismissed for failure to state a claim, whether Jennings violated the RPCs was not necessary to the disposition of the case and I submit that it was dicta. See Bandler v. Melillo, 443 N.J. Super. 203, 210 (App. Div. 2015) (Explaining that dictum is a

statement that is not necessary to the decision being made, which is entitled to consideration but is not binding).

Third, during the pendency of this appeal, Jennings died.[16] Thus, any concerns about restoring the public trust are moot; Jennings cannot be disciplined. Even if Jennings's conduct was egregious, there is no opportunity, in this case or another, to restore the public trust by disciplining Jennings. Thus. the only valid concern that Stagecoach can put before the Court is whether his complaint should have been dismissed; his concerns about the public trust should be ignored.

2. Jennings's Conduct Violated the RPCs Based on the Facts as Pled.

First, I submit that, contrary to Printing Mart, 116 N.J. at 746, the Appellate Division did not consider only the facts alleged on the face of the complaint. Further, the court did not assume the facts as alleged were true. See Velantzas, 109 N.J. at 192.

For example, the complaint states that, "[a]t the outset of Jennings's representation . . . he knew of his long-standing personal relationship with Board member Joseph Cash" (Pa 14a ¶8) and "Jennings knew at the outset of the Board Hearings exactly what services he provided to Cash" (Pa 17a ¶30).

[16] hREDACTED

However, the Appellate Division relied on the fact that "Jennings was unaware of the conflict before disclosing same to the Board" to support its conclusion. Stagecoach Motors Corp., No A-XXXX-XX(slip op. at 23-24). It is not possible for Jennings to have known about the conflict at the outset of the proceedings (alleged in the complaint), to have disclosed the conflict at the ninth meeting (undisputed fact), and for Jennings to have disclosed the conflict upon learning of it (as the Appellate Division found). Thus, I submit that the Appellate Division did not accept the allegations in the complaint, instead, it relied on its own determination of fact.[17]

If the Court accepts the facts as alleged in the complaint, then Jennings was aware of his conflict at the outset of the proceedings but did not disclose the conflict until much later. An attorney is required under RPC 3.3(a)(5) to disclose a "material fact knowing that the omission is reasonably certain to mislead the tribunal" unless otherwise provided by law.[18] The action in lieu of prerogative writs was successful because Judge Kristofferson determined that

[17] I note that Stagecoach's appendix contains the transcripts from the Board hearing where he disclosed the conflict. In that transcript, Jennings states that he disclosed the conflict as soon as he learned of it. See (Pa 112a-115a).
[18] Stagecoach's argument that the Appellate Division did not consider the Board a "tribunal" is entirely meritless. The Appellate Division directly refers to the Board as a tribunal. Stagecoach Motors Corp., No A-XXXX-XX(slip op. at 23) ("Jennings did not . . . make a false statement . . . to anyone, including 'a tribunal' -- the Board.").

there was a conflict between Jennings and Cash; I thus submit that their relationship was a material fact. If the Court accepts Stagecoach's allegation that Jennings was aware of this relationship at the outset, I submit that Jennings's conduct violated RPC 3.3(a)(5). Alternatively, if the Court does not accept that Jennings was aware of the conflict at the outset of the proceedings, then I recommend it affirm the Appellate Division on this point.

Moreover, the complaint alleges that Jennings was aware of the following facts: (1) Jennings had a long-standing personal relationship with Cash; (2) Jennings was a witness to Cash's 2003 will; (3) Jennings was the executor and successor trustee under Cash's 2014 will; (4) Jennings notarized Cash's 2014 estate documents at his (Jennings's) home with his wife and son serving as witnesses. (Pa 14a-15a). Reading the Board transcripts, these were not disclosed in Jennings's eventual disclosure.[19] Although making an incomplete disclosure can give rise to an ethical violation, I submit that what Jennings disclosed was sufficient to reveal that a conflict existed; in other

[19] Stagecoach attempts to limit Jennings's disclosure before the Board to Jennings's statement that he did not draft any of "those documents." (P_App.Div. 30). I submit that this is an unfair reading of the Board transcripts. The Board's attorney, Mr. Strait provided more details and Jennings adopted those statements. See (Pa 112a-114a). I submit that Jennings's disclosure -- the statements that he adopted and the disclosures he affirmatively made -- did not disclose the facts listed above.

words, what Jennings did not disclose does not seem to be significant enough to give rise to an ethical violation.

Compare this case with In re Seelig, 180 N.J. 234 (2004). In that case, an attorney represented to the municipal court that his client's car accident caused "injuries" when in reality those "injuries" were the death of two people. Id. at 238-39. Because these deaths were not disclosed to the court, the client was allowed to plead guilty to non-indictable municipal offenses. Id. at 239. This raised the potential for a double jeopardy defense if the client was ever indicted in connection with the deaths. Id. at 243. Had the attorney revealed that the "injuries" were deaths, the court would have stayed the proceedings until any indictable offenses had been processed. Id. at 240 (explaining Administrative Directive No. 10-82, issued by the Administrative Director of the Courts). This Court determined that the attorney misled the tribunal and thus violated the RPCs. Id. at 258.

I submit that to the extent Jennings's disclosure was lacking in detail, it was not misleading to the tribunal. In Seelig, the attorney's lack of disclosure prevented the administrative directive from kicking in, but that was a binary -- if he revealed the truth that someone had died, the directive would have applied. Here, Jennings disclosed a conflict. Unless disclosure of the additional details that Stagecoach alleges would have led to a different

outcome (e.g., starting the hearings over without Cash), this case is different from Seelig and that lack of complete disclosure made no difference. I submit that the additional details did not matter. Upon learning of the conflict, the Board's attorney called for consideration of the relevant law with respect to conflicts. See (Pa. 115a-116a). At this point, whatever disclosure Jennings had made was sufficient to trigger the Board's obligation to investigate the conflict further; this is directly the opposite of the attorney's disclosure in Seelig, which prevented further investigation and application of the administrative directive.

Thus, I submit that Jennings's disclosure was not deficient, it was just late. Accordingly, Stagecoach's argument that the Appellate Division ignored the facts as pled with respect to Jennings's late disclosure is persuasive and his argument that he made an incomplete disclosure is not. Taking the facts as they are pled, I submit that Jennings violated the RPCs by not disclosing his conflict at the outset of the proceedings. However, because this is not a disciplinary matter, this RPC violation only matters to inform whether Jennings owed Stagecoach a duty.

B. The Entire Controversy Doctrine Does Not Bar This Claim, But Stagecoach's Argument is Misplaced.

1. Stagecoach Could Have Asserted Its Claims in the Action in Lieu of Prerogative Writs.

Stagecoach could have asserted his claims against Defendants in the action in lieu of prerogative writs. First, the Appellate Division and Defendants are correct that "[t]here is no bright-line rule that prevents interrelated claims from being adjudicated in connection with an Action in Lieu of Prerogative Writs." (R_Opp.8). Indeed, New Jersey joinder rules allow "[a]ll persons [to] be joined as defendants . . . if the right to relief asserted . . . against the defendants arises out of or in respect of the same transaction [or occurrence] . . . and involves any question of law or fact common to all of them." R. 4:29-1(a). The rules also allow a plaintiff to "join, either as independent or as alternate claims, as many claims, either legal or equitable or both, as he or she may have against an opposing party." R. 4:27-1.

Stagecoach argues, however, that Ballantyne House, 269 N.J. Super. 322 and O'Neil v. Township of Washington, 193 N.J. Super. 481 (App. Div. 1984) categorically preclude an action for damages alongside an action in lieu of

prerogative writs. I disagree; these cases are meaningfully distinguishable, and Stagecoach's reading of these cases strips them of all nuance.

Ballantyne House concerned a suit against a municipality for breach of a tax abatement agreement and the repeal of a city ordinance. 269 N.J. Super. at 328-29. The plaintiffs challenged the city ordinance on constitutional grounds and sought specific enforcement and money damages for the breach of the tax abatement agreement. Id. at 330-32. The municipality argued that the plaintiff's case was actually a prerogative writs action and should thus be dismissed as untimely because they were commenced after the 45 day time limit applicable to prerogative writs actions. Id. at 330. The Appellate Division explained that the constitutional challenge could survive either as a declaratory judgment action (not subject to the prerogative writs time limit) or as a prerogative writs action (constitutional challenges brought as actions in lieu of prerogative writs are usually given time extensions). Id. at 330.

With respect to the claims for specific performance and money damages, the Appellate Division explained that these were essentially garden-variety breach of contract claims and were not actually maintainable as actions in lieu of prerogative writs. Id. at 331 (citing O'Neil, 193 N.J. Super. at 486 (actions seeking money damages are not cognizable as actions in lieu of prerogative

writs)). These claims were thus not subject to the time requirements of an action in lieu of prerogative writs. Ibid.

In O'Neil, the Appellate Division explained that an action in lieu of prerogative writs "is a substitute form of action which adheres to the basic principles of the formal writ it replaces." 193 N.J. Super. at 486. The Appellate Division explained that a challenge seeking review of judicial, administrative, or municipal action is akin to the formal writ of certiorari. Ibid. Certiorari is not available when there is another adequate remedy such as money damages. Ibid. Thus, an action seeking money damages "is an action for damages and not an action in lieu of prerogative writs." Ibid.

Neither case held that a claim for money damages could not be joined with an action in lieu of prerogative writs. Rather, I submit that those cases hold that a cause of action seeking damages is itself not an action in lieu of prerogative writs. Indeed, Ballantyne House explicitly deemed some claims before the court to be permissible as actions in lieu of prerogative writs and other claims as ordinary breach of contract claims. Tellingly, the court did not dismiss the damages claims that were brought alongside the prerogative writs action.

I submit that Stagecoach confuses the idea that claims for money damages are not maintainable **as** actions in lieu of prerogative writs with the

(nonexistent) idea that claims for money damages are not maintainable **alongside** actions in lieu of prerogative writs. Stagecoach sued the municipality and Highwayman in the prerogative writs action; it sued Jennings and his firm in this action. Stagecoach sought a remand to the planning board and ancillary relief in the prerogative writs action; it seeks tort damages here. The relief Stagecoach seeks in this action would not be competent to assuage its injuries alleged in the prerogative writs action; Stagecoach essentially sought certiorari in the prerogative writs action and seeks tort relief here. Thus, I submit that there is no principle that would preclude Stagecoach from having raised its claims for damages alongside its claim against the Board challenging the municipal action. Therefore, Stagecoach's discussion of fairness is irrelevant.[20]

[20] I briefly distinguish Dimitrkopoulos, 237 N.J. 91 (2019), on which Stagecoach relies. In Dimitrikopoulos, the eventual plaintiffs were sued by their former attorney in a collections action. Id. at 99. In the collection action, the plaintiffs did not allege legal malpractice as a defense. Ibid. Three years later, the plaintiffs sued for legal malpractice and the trial court barred their claim under the entire controversy doctrine, reasoning that the legal malpractice claim should have been brought in the collections action. Id. at 98-99. Normally, this claim would be barred by the entire controversy doctrine because it is transactionally related to the collections matter and brought against a party to that action. However, the Court remanded for a determination as whether the plaintiffs would have had a "fair and reasonable opportunity to litigate their malpractice claim" in the collections action. Id. at 120. As explained below, Stagecoach did not need to assert its claims in the action in lieu of prerogative writs, unlike the plaintiffs in Dimitrikopoulos who, if not for fairness considerations, would have needed to.

2. Stagecoach Did Not Need to Assert Its Claims in the Action In Lieu of Prerogative Writs.

Although I conclude that Stagecoach could have asserted its claims for damages alongside the action in lieu of prerogative writs, I conclude that it did not need to for purposes of the entire controversy doctrine. True, Stagecoach's claims from the prerogative writs action are transactionally related to the claims for damages here: factually, both actions almost exclusively concern Jennings's conduct before the planning board. I submit, however, that the entire controversy doctrine does not bar Stagecoach's suit for damages and that the Appellate Division erred in so affirming. If the Court agrees with my conclusion, it may proceed to the merits of whether Stagecoach pled a cause of action. If the Court disagrees with my conclusion and determines that the entire controversy doctrine does apply, it need not proceed any further because Stagecoach's claims, no matter how plausible or otherwise meritorious, are precluded.

The entire controversy doctrine does not apply to this suit because the doctrine no longer embraces mandatory party joinder. The Appellate Division essentially demanded that Stagecoach join Defendants in the prerogative writs action.

Under the entire controversy doctrine, unless an exception applies, one must assert all transactionally related claims against each named defendant or that claim will later be precluded. See R. 4:30A. The entire controversy doctrine used to require that transactionally related claims against all transactionally related parties be adjudicated in the same action. Cogdell, 116 N.J. at 26-27 (establishing the requirement for mandatory party joinder). That is no longer the case as the rules have done away with mandatory party joinder unless an exception applies. Pressler & Verniero, supra, comment 1 on R. 4:30A

In the action in lieu of prerogative writs, Stagecoach named as defendants: (1) the Board and (2) Highwayman. In this case, Stagecoach named as defendants: (1) Jennings; (2) Jennings's firm; and (3) John/Jane Does 1-10. Thus, contrary to the Appellate Division's conclusion, although the two actions concern "the same set of facts," they do not concern "the same parties." See Stagecoach, A-1954-20 (slip. op. 22). Under the current R. 4:30A, Stagecoach is barred from asserting claims stemming from the planning board hearing against the Board and Highwayman, because they were parties to the action in lieu of prerogative writs. But Stagecoach did not join Defendants to that action and thus, unless an exception applies (discussed below) Stagecoach is not barred from asserting claims stemming from the

planning board hearing against new parties in this subsequent action. See Pressler & Verniero, supra, comment 1 on R. 4:30A.

Under the current rules, a nonparty to the first action who seeks to invoke the entire controversy doctrine in a subsequent action "has the burden of establishing both inexcusable conduct and substantial prejudice." Hobart Bros. Co. v. National Union Fire Ins. Co., 354 N.J. Super. 229, 242 (App. Div. 2002). Defendants have not argued this point. Thus, I submit that although Defendants may get the benefit of issue preclusion against Stagecoach (provided the requirements are met), the entire controversy doctrine does not apply. I thus recommend that this Court **REVERSE** the Appellate Division on this point.

C. The Procedural Dismissal of the Complaint Was Proper Under R. 4:6-2.

1. Professional Negligence

I submit that Stagecoach has failed to plead a prima facie case of legal malpractice and thus recommend that this Court **AFFIRM** the Appellate Division on this point.

A prima facie case of legal malpractice consists of: (1) an attorney-client relationship that creates a duty of care; (2) breach of that duty; and (3) proximate cause. Id. at 442-43 (quoting Nieves, 241 N.J. at 582). Because an

attorney-client relationship is an element of legal malpractice, the cause of action is usually only available to a client-plaintiff. Pressler & Verniero, Supra, Comment 4.2.1 on Rule 4:6-2. As explained below, I submit that Stagecoach has pled facts sufficient to allege the existence of a duty and breach of that duty. However, I submit that Stagecoach's complaint has not adequately alleged that the breach of that duty was the proximate cause of any damages it sustained.

I submit that Stagecoach has pled facts sufficient to support the imposition of a duty, notwithstanding the lack of attorney-client privity. Only in "exceedingly narrow" circumstances is a non-client owed a duty and permitted to pursue a legal malpractice claim. Morgan Props., 215 N.J. at 458. To determine whether such a duty exists, the Court must consider the attorney's duty to his own clients and balance that against the public's interest in the proposed solution. See Petrillo, 139 N.J. at 479; Davin, 329 N.J. Super. at 73.

Here, considering only the facts as alleged on the face of the complaint, I submit that there is no reason for hesitation in imposing a duty on Jennings. Indeed, on the facts alleged in the complaint, Jennings knew that he had a conflict with Cash and chose not to disclose it for his client's benefit. (Pa 14a ¶8);(Pa 17a ¶30); (Pa 15a ¶15). Although an attorney is to be a zealous

advocate, they are already not permitted to use unethical means to pursue their clients' ends. I submit that only if an attorney was permitted to take advantage of relationships (that give rise to conflicts of interest) would imposing a duty to disclose known conflicts at the outset of a proceeding before a tribunal jeopardize the attorney's duties to clients.

Moreover, this Court has typically imposed duties on attorneys, owed to non-clients, when the attorney has invited the non-client to rely on his representations and the non-client reasonably does so. See e.g., Banco Popular, 184 N.J. at 178-81 ("the invitation to rely and reliance are the linchpins of attorney liability to third parties."). Assuming that the Jennings-Cash conflict of interest was a material fact (the action in lieu of prerogative writ suggests it was), then Jennings was under an ethical obligation to disclose that fact. See RPC 3.3(a)(1); RPC 3.3(a)(5). Thus, unless Stagecoach was to presume that Jennings was committing an ethics violation, I submit that it relied on Jennings's non-disclosure to assume that Jennings had no conflict because an ethical attorney would have done so.

Likewise, I submit that Jennings breached his duty owed to Stagecoach. As Stagecoach alleges, Jennings knew of the conflict at the outset of the proceedings and intentionally did not disclose it as to gain an advantage for his client. (Pa 14a ¶8);(Pa 17a ¶30); (Pa 15a ¶15). If the potential duty owed to

Stagecoach is one to disclose conflicts at the outset of a proceeding before a tribunal, Stagecoach has alleged facts that, if accepted as true, suggest that Jennings breached his duty to Stagecoach.

However, I submit that Stagecoach has failed to plead a cause of action for legal malpractice for want of proximate causation. On the face of its complaint, Stagecoach does not allege how anything would have been different if Jennings disclosed the conflict earlier. Indeed, upon disclosing the conflict, the Board's attorney had the Board and parties determine whether a conflict existed under Wysokowski, 132 N.J. at 532 before proceeding. (Pa 115a). Cash simply refused to recuse himself. (Pa 15a ¶16). As the facts are alleged, even if Jennings disclosed his conflict at the outset of the Board hearings, Stagecoach still would have had to appear before the Board and file its action in lieu of prerogative writs. Thus, I submit that Stagecoach has failed to state a claim upon which relief can be granted and recommend that this Court **AFFIRM** the judgment of the Appellate Division.

2. Intentional Misrepresentation/Equitable Fraud

I submit that Stagecoach has not stated a claim for intentional misrepresentation such that the Appellate Division did not err in dismissing this claim. The elements of common law fraud are: (1) the defendant makes a representation or omission of material fact; (2) with knowledge of its falsity;

(3) intending to induce reliance on the representation or omission; (4) the plaintiff reasonably relied on the representation or omission; and (5) resulting damages. See Allstate New Jersey Ins. Co., 222 N.J. at 147.

Here, Stagecoach alleged that Jennings made an omission of material fact. As explained above, Stagecoach alleged that Jennings knew of his conflict with Cash at the outset of the Board proceedings. E.g., (Pa 14a ¶8);(Pa 17a ¶30). If Jennings knew of this fact from the outset and did not disclose it until the ninth meeting, he omitted a material fact. Moreover, the complaint alleges that Jennings did not mention the conflict "as to gain an unfair advantage for his client." (Pa 15a ¶15). I submit that this fact was material because it resulted in the Board's decision being overturned in the action in lieu of prerogative writs.

However, I submit that Stagecoach has not pled facts to allege resulting damages. Regardless of when Jennings made his disclosure, the fact remains that he did make a disclosure before the Board had its vote. Stagecoach does not allege that the outcome of the Board hearing would have been different if Jennings had made his disclosure earlier than he did. Notwithstanding Stagecoach's disclosure, Cash did not recuse himself and there is nothing to suggest that he would have done so if the disclosure had come earlier. (Pa 15a ¶16). Thus, on the face of the complaint, there is nothing to suggest that

Jennings's delay in disclosing the conflict -- which is the basis for concluding that he made a misrepresentation or omission of material fact -- actually lead to a different result than if Jennings made his disclosure at the outset. In other words, based on the facts as alleged in the complaint, even if Jennings promptly made his disclosure, Stagecoach still would have participated in the "sham" Board hearings and needed to file its action in lieu or prerogative writs. Accordingly, I submit that Stagecoach has failed to plead a cause of action for intentional misrepresentation.

In addition, I submit that Stagecoach has not pled a cause of action for equitable fraud because only equitable relief is available for equitable fraud. See e.g., Daibo v. Kirsch, 316 N.J. Super. 580, 591 (App. Div. 1998). In contrast, Stagecoach seeks "compensatory and consequential damages, punitive damages, costs of suit, attorneys' fees and other such relief."

I thus recommend that this Court **AFFIRM** the judgment of the Appellate Division.

3. Breach of Fiduciary Duty

I submit that this claim is at best duplicative of the claim for professional negligence. To the extent it is not so duplicative, I submit that Stagecoach has failed to state a claim because there is no relationship upon which to impose a fiduciary duty.

A fiduciary duty exists when one person is under a duty to act for the benefit of another on a matter within the scope of their relationship. See F.G. v. MacDonell, 150 N.J. 550, 564 (1997) (citing Restatement (Second) of Torts § 874 cmt. A (1979)). Although an attorney owes fiduciary duties to clients, fiduciary duties can arise in other contexts; in other words, one need not be acting in their capacity as an attorney to be a fiduciary. So long as one acts for the benefit of another within the scope of their relationship, there can be a fiduciary duty. See e.g., F.G., 150 N.J. at 567 (holding that a priest may owe fiduciary duties to members of his congregation).

Here, there is nothing to suggest that Stagecoach and Jennings had any relationship other than that of adversary. There is also nothing to suggest that Stagecoach relied on Jennings to act on its behalf. Stagecoach's argument is essentially that because Jennings is an attorney, he owes a fiduciary duty to all persons to abide by the RPCs.

I submit that if Jennings owed Stagecoach a fiduciary duty, it cannot stem from a relationship of trust. Indeed, the exact opposite is true, Stagecoach should have expected that Jennings was actively working against its interests. See e.g., United Jersey Bank v. Kensey, 306 N.J. Super. 540, 554 (App. Div. 1997). To impose a fiduciary duty on these facts is to impose a fiduciary duty -- owed to the general public -- on all professionals who are

bound by a code of ethics. I submit that this is inconsistent with the general notion that a fiduciary duty exists when one party is acting for the benefit of another within the scope of their relationship. I thus recommend that this Court **AFFIRM** the Appellate Division on this point.

4. Vicarious Liability

I submit that Stagecoach has waived this issue on appeal and recommend that the Court **AFFIRM** dismissal of this claim. Stagecoach has not briefed this issue on appeal. Before the Appellate Division, although Stagecoach's brief contains a point heading that states: "The trial court erred in dismissing the complaint as plaintiff has alleged facts to support a cause of action for breach of fiduciary duty and vicarious liability," Stagecoach did not include any substantive discussion whatsoever of this point in its brief. See (P_App.Div. 23-25). That entire section of the brief discusses only the "breach of fiduciary duty" claim. "An issue not briefed on appeal is deemed waived." Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler, Current N.J. Court Rules, comment 3 on *R.* 2:6-2 (2023).

However, this claim was initially dismissed because the claims for direct liability upon which this claim relies were dismissed for failure to state a claim. If this Court determines that Stagecoach has pled sufficient causes of action for direct liability against Jennings, I submit that it has likewise pled a

sufficient cause of action for vicarious liability against his law firm and the John/Jane Does.

VI. Recommendation & Conclusion

I respectfully recommend that this Court **affirm** in part and **reverse** in part.

David M. Stewart

2995 Chapel Avenue West, Apt 5M · Cherry Hill, NJ 08002 · 570-269-8341 · Dave.StewartIII.Law@gmail.com

This writing sample is an excerpt from an appellate brief that I wrote for Seton Hall University School of Law's annual Eugene Gressman Moot Court Competition. The full-length brief scored highest in the competition. The case was before the Supreme Court of the United States on writ of certiorari from the fictitious "United States Court of Appeals for the Thirteenth Circuit." All facts occurred in the fictitious state of "Setonia." I have omitted all but the "Legal Argument" and "Conclusion." All citations to the record on appeal follow the pagination "R." Please find a brief recitation of the pertinent facts below.

In 2020, Petitioner Scott Lang ("Petitioner") robbed a T-Mobile store in Setonia City, Setonia. The store is a single-story, consisting of a sales floor, a bathroom, and a back room, which houses employee lockers and the store's cash deposits. Upon seeing Petitioner, masked and brandishing a pistol, the store's lone employee, Tony Stark ("Stark") froze behind the service counter, felt his breath fall short, and clutched his chest in fear. Petitioner noticed something was wrong and approached Stark because he suspected a panic button might be under the desk. Petitioner approached Stark, ordered him to calm down, and demanded to know where the store kept its money. Stark replied that he suffers from stress induced panic attacks and needed his medication, which he keeps in the back room. Petitioner then forced Stark at gunpoint into the back room. After Stark took his medication, Petitioner again demanded to know where the store kept its money. Stark replied that the money was in a drawer in the same room they currently occupied and handed Petitioner a key. When police arrived at the scene, Petitioner fled but was eventually arrested.

Following his arrest, a Grand Jury indicted Petitioner for armed robbery under 18 U.S.C. § 1951. At his jury trial, Petitioner was found guilty, and the district court entered a judgment of conviction. At Petitioner's sentencing hearing, the prosecution applied for a sentence enhancement under U.S.S.G. § 2B3.1 for abducting Stark during the robbery. Petitioner challenged the enhancement on two grounds. First, Petitioner argued that he did not abduct Stark because the store's back room and sales floor are the same "location," such that he did not force Stark's movement to a "different location." Second, Petitioner argued that the enhancement did not apply because he did not move Stark "in furtherance" of the robbery. The district judge rejected both challenges. Petitioner appealed to the United States Court of Appeals for the Thirteenth Circuit, which affirmed his conviction and upheld his sentence in full. The Supreme Court granted certiorari.

LEGAL ARGUMENT

I. THIS COURT SHOULD AFFIRM PETITIONER'S SENTENCE ENHANCEMENT FOR ABDUCTION BECAUSE THE T-MOBILE BACK ROOM AND SALES FLOOR ARE "DIFFERENT LOCATIONS" FOR PURPOSES OF U.S.S.G. § 2B3.1 AND PETITIONER ABDUCTED STARK IN FURTHERANCE OF THE ROBBERY.

The United States Sentencing Guidelines ("Sentencing Guidelines" or "Guidelines") contemplate a four-level sentence enhancement when a defendant moves a victim from one room to another within the same building to facilitate "commission of the offense" *or* "escape." U.S.S.G. § 2B3.1(b)(4)(A). The Guidelines define abduction as a victim being "forced to accompany an offender to a different location." U.S.S.G. § 1B1.1, cmt. n.1(A); § 2B3.1, cmt. n.1. The Sentencing Guidelines, however, do not define "different location." Rather, they use plain, non-technical language, such that a court may find abduction whenever a criminal forces his victim to move between different "locations." The Guidelines exist to protect such victims from the increased danger that accompanies forced movement from one location to another during the commission of a crime. To foreclose the possibility that movement about a single structure can constitute abduction is to render the Guidelines ineffective. In contrast, finding abduction where, as here, a criminal moved his victim about a single building furthers the purpose of the enhancement. A criminal abducts his victim "in furtherance of the crime" when the abduction enables the crime to occur or facilitates his escape.

A. The Phrase "Different Location," As Used In U.S.S.G. § 2B3.1, Must Be Read In Its Ordinary, Fixed Meaning, Which Supports The Thirteenth Circuit's Interpretation Of The Sentencing Guidelines.

This Court should affirm Petitioner's sentence because well-settled principles of statutory interpretation support the Thirteenth Circuit's holding that the T-Mobile sales floor and employee back room are "different location[s]" for purposes of abduction under U.S.S.G. § 2B3.1. In *Caminetti v. United States*, this Court explained that "the meaning of [a] statute must, in the first

instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms." 242 U.S. 470, 485 (1917). Put differently, "[w]ords are to be understood in their ordinary, everyday meanings—unless the context indicates that they bear a technical sense." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). Here, the Sentencing Guidelines do not define "location," such that there is *nothing* to suggest that the phrase bears a technical definition. *See, e.g.*, *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.") (cleaned up). Indeed, neither the majority nor dissenting opinion below suggests that the phrase "different location" bears a technical definition in U.S.S.G. § 1B1.1. R.9-10; R.12-13. Thus, the phrase "different location" must be given its everyday, ordinary meaning. The Thirteenth Circuit's conclusion is consistent with other circuit courts that have considered this issue, and this Court should affirm.

For example, in *United States v. Hawkins*, the Fifth Circuit affirmed an abduction sentence enhancement where the defendant forced a robbery victim "against his will to walk approximately 40 to 50 feet" across a parking lot. 87 F.3d 722, 726 (5th Cir. 1996) (collecting cases). The court explained that "location" can refer to a "point inside or outside a building" such that crossing the threshold "separating the interior and exterior of a building" would constitute movement "to a different location." *Id.* at 727 (internal quotations omitted). The court explained that "location" can *also* refer to "a single point where a person is standing, or to one among several rooms within the same structure, or to different floors within the same building." *Id.* In other words, "location" is to be interpreted with flexibility, on a "case by case" basis—not mechanistically—because it would be "unduly legalistic, even punctilious" to say that two places cannot be "different

locations" simply because "something as coincidental and insignificant as a lot line or doorway" was or was not crossed. *Id.* at 728. Although the presence (or absence) of doorways, property lines, and other "dividers" is not dispositive in determining whether two places are "different locations," the presence of such "dividers" is useful in the analysis.

Indeed, in *United States v. Osborne*, the Fourth Circuit affirmed an abduction sentence enhancement where a robber forced two pharmacists to accompany him from the "pharmacy section" of a Walgreens, through the store, to the entrance/exit. 514 F.3d 377, 389-90 (4th Cir. 2008). The court, citing *Hawkins*, explained that it is "ordinary parlance" to say that the pharmacy area of the store and the customer area are "discrete 'locations,' each being like 'one among several rooms in the same structure.'" *Osborne*, 514 F.3d at 390. The court had little difficulty reaching this decision, finding it "especially true" that the pharmacy area and store area were different locations because they were "divided by a counter" and a door "intended to be passable only by authorized persons . . . ." *Id.*

Reading *Hawkins* and *Osborne* together makes clear that Petitioner moved Stark to a different location for purposes of U.S.S.G. § 2B3.1's abduction enhancement. When Petitioner first encountered Stark, Stark was "located" behind the service counter—on the sales floor—"several feet" in front of the door that leads to the back room. R.4. At gunpoint, Petitioner forced Stark off the sales floor, through a door, and into the back room. R.6. Under either definition of "location" proposed in *Hawkins*, i.e., "a single point where a person is standing" or "one among several rooms within the same structure," Petitioner moved Stark from one "location" to another. Indeed, Petitioner forced Stark to cease occupying the "single point" behind the sales counter and move to the "single point" that is the back room.[1] Further, Petitioner forced Stark to

[1] It is also worth noting that Petitioner forced Stark to remain in his initial location, commanding that "Nobody move, and nobody gets hurt!" R.5.

occupy two "among several rooms" within the T-Mobile store—the sales floor and the back room. R.6. Not only does the Fifth Circuit's reasoning in *Hawkins* compel the conclusion that the T-Mobile sales floor and back room are different locations, but the Fourth Circuit's reasoning in *Osborne* compels this conclusion *a fortiori*.

Indeed, not only did the Fourth Circuit find that the pharmacy and store areas of the Walgreens were "different locations," it also reasoned that the particular features of the store "especially" compelled this conclusion. Just as the Walgreens pharmacy area was separated from the store area, so too was the T-Mobile back room separated from its sales floor—the back room was located behind the checkout counter and closed off from the rest of the store by a door. Further, just as the Walgreens pharmacy area was to be accessible only to employees, the back room of the T-Mobile was to be accessible only to employees.[2] Both *Hawkins* and *Osborne* explained that the term "location" is to be applied flexibly, on a case-by-case basis, to evaluate whether movement from one place to another constitutes movement to a different "location." This common sense, plain reading of the term "location" is superior to the "unduly legalistic, even punctilious" alternative that would refuse to deem the sales floor and back room "different locations." The sales floor and back room of the T-Mobile are different locations and this Court should affirm Petitioner's entire sentence.

B. The Purpose Of U.S.S.G. § 2B3.1 Compels The Conclusion That Movement Between Different Rooms In The Same Building Can Constitute Abduction And A Reading Of The Guidelines Which Forecloses Such A Determination Renders The Guidelines Ineffective By Needlessly Endangering Robbery Victims.

This Court should affirm Petitioner's abduction sentence enhancement because U.S.S.G. § 2B3.1 aims to protect victims against the additional danger that accompanies their forced

[2] Unless, of course, it can be said that the room which: (1) is behind the sales counter; (2) is accessible only through a door; (3) contains employee lockers; and (4) houses the store's cash deposits is open to the public.

movement during the commission of a crime. *See, e.g.*, *U.S. v. Whooten*, 279 F.3d 58, 61 (1st Cir. 2002) ("This Court has observed that the abduction enhancement is intended, at least in part, to protect victims against additional harm that may result from the victim's isolation"); *United States v. Saknikent*, 30 F.3d 1012, 1013 (8th Cir. 1994) ("Abduction increases the gravity of . . . crimes because . . . isolat[ing] the victim increases the likelihood that the victim will be harmed."). Only by holding that different rooms within the same building can constitute different "locations" can this Court give effectuate this purpose. Thus, the Thirteenth Circuit's holding—that Petitioner abducted Tony Stark by forcing him, at gunpoint, to leave one room of the T-Mobile and enter another—is consistent with the purpose of the Sentencing Guidelines because it helps to deter and punish those who expose victims to additional danger while committing a crime. To properly interpret a statute, the Court must consider the "purpose and context of the statute." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001) ("We must, of course, construe the [statutory] language . . . with reference to the statutory context in which it is found and in a manner consistent with [its] purpose."). In cases considering the scope of U.S.S.G. § 1B1.1 cmt. n.1 (A), multiple circuit courts have concluded that finding movement about a single building to constitute movement to a "different location" is harmonious with the Guidelines' goal of protecting victims of crime.

Osborne elaborated upon the inherent dangers of moving victims during a robbery. 514 F.3d 377. As explained, *infra*, the *Osborne* court affirmed an abduction enhancement where the defendant forced two pharmacists to accompany him from a Walgreens pharmacy area, through the store, to its entrance/exit. *Id.* at 390. Beyond finding that the pharmacy area and the store area were "different locations," the court explained that the defendant "engaged in conduct *plainly targeted* by the abduction enhancement: keeping victims close by as readily accessible

hostages." *Id.* at 390 (emphasis added). The Fourth Circuit, citing *Whooten*, 279 F.3d at 61, explained that the sentence enhancement exists to protect victims from additional harm that may result from being moved during the commission of a crime. *Osborne*, 514 F.3d at 390. Specifically, the court stated that moving a robbery victim from one location to another increases the chance the victim will be harmed, whether by isolating the victim (such that they are more easily subject to "sexual assault or other crimes") or by rendering the victim a "readily accessible hostage[ ]." *Id.*

The Fourth Circuit is not alone in its reasoning. In *United States v. Reynos*, the Third Circuit affirmed an abduction enhancement where the defendant robbed a pizzeria and forced its employees to walk 34 feet from the bathroom to the cash register. 680 F.3d 283 (3d. Cir. 2012); *see also United States v. Archuleta*, 865 F.3d 1280, 1288 (10th Cir. 2017) ("In our view, the Third Circuit's decision in *Reynos* is the most consistent with [the Guidelines]."). There, the court recounted the facts of the robbery: namely, that the employees knew a robbery was imminent and retreated to "a place of relative safety—a small bathroom, behind a locked door" to call the police. *Reynos*, 680 F.3d at 285-88. Thereafter, the defendant, brandishing a pistol, kicked in the bathroom door, and demanded that someone open the cash register. *Id.* The court, citing First and Eighth Circuit authority, noted that moving robbery victims from one location to another allows the offender to "isolate his or her victims, thereby increasing the chance that they will be harmed." *Id.* at 287-88 (citing *United States v. Cunningham*, 201 F.3d 20, 28 (1st Cir. 2000) and *Saknikent*, 30 F.3d at 1013-14). The court explained that forced movement of the victims from the bathroom to the register "increase[ed] the chance that they [would] be harmed." *Id.* at 288. In a footnote responding to concerns raised by the dissent,[3] the Third Circuit majority explicitly

[3] The dissent would have required an additional aggravating circumstance—that movement have been accomplished in a manner and/or for a reason that the abduction enhancement was specifically designed to prevent.

recognized that "forcing movement to facilitate commission of the crime is [itself] a circumstance the enhancement was specifically designed to prevent." *Id.* at 287 n.3.

Here, just as in *Osborne*, Petitioner kept his victim, Tony Stark, "close by," rendering him a "readily accessible hostage[]." Indeed, after being informed that Stark needed medication, which he kept in a separate room, Petitioner "forced Stark to lead him into the back room." R.6. Although Petitioner *could* have let Stark retrieve his medication without supervision, Petitioner made sure to keep Stark close by as a "readily accessible hostage[]." R.6. By not allowing Stark to retrieve his medicine by himself, Petitioner engaged in conduct "plainly targeted by the abduction enhancement." Thus, by concluding that Petitioner abducted Stark, the court below effectuated the Guidelines' goal of punishing (and thus deterring) the dangerous act of moving a victim during a robbery. Any other reading of the Guidelines would allow Petitioner's isolation of Stark—and its inherent dangers—to go unpunished and undeterred. In forcing Stark at gunpoint from the sales floor to the back room, Petitioner isolated Stark. This isolation, per *Reynos*, "thereby increase[d] the chance [Stark would] be harmed." In holding that Petitioner abducted Stark, the Thirteenth Circuit allowed the Guidelines to work as intended. When Stark was in the company of other customers, he was in a place of "relative safety," just like the victims in *Reynos*. Just as the Third Circuit recognized that moving a robbery victim creates the very risk the Guidelines intend to punish, so too should this Court find that moving Stark from a place of relative safety to a place of utter isolation exposed him to this same risk.

Moving a robbery victim is inherently dangerous and any interpretation of U.S.S.G. § 1B1.1 that forecloses the possibility of movement about a single building giving rise to "abduction" frustrates the very purpose of the statute and renders it ineffective. *See* Scalia & Garner, *supra*, at 63 (explaining that the "Presumption Against Ineffectiveness" follows

"inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness"). Conversely, an interpretation of the Guidelines that allows for movement about a single building to constitute "abduction" actually protects victims and renders the Guidelines effective. This Court should affirm the Thirteenth Circuit's decision. *See* Scalia & Garner, *supra*, at 69 ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored.").

C. Petitioner Forced Stark To Move From The Sales Floor To The Employee Back Room In Furtherance Of The Robbery.

This Court should affirm Petitioner's abduction sentence enhancement because Petitioner abducted Stark in furtherance of the robbery. The Sentencing Guidelines call for a four-level increase to a defendant's sentencing level whenever the defendant abducts someone to "facilitate" commission of the crime *or* to "facilitate escape." U.S.S.G. § 2B3.1(b)(4)(A). When, as here, a criminal abducts someone to prevent the victim from contacting the police, the abduction was committed to facilitate commission of the crime and/or to facilitate the criminal's escape. In *United States v. Nale*, the defendant kidnapped his ex-girlfriend and committed a carjacking in the process. 101 F.3d 1000, 1002 (4th Cir. 1996). When the defendant first approached his ex-girlfriend, she was in a car with another victim, Steven Cool ("Cool"). *Id.* The defendant entered the vehicle, and, at gunpoint, ordered the couple to drive "up the road a short distance." *Id.* After "a time," the defendant ordered Cool out of the car and commanded his ex-girlfriend to drive away. *Id.* The Fourth Circuit affirmed the district court's use of the abduction enhancement, concluding that the defendant abducted Cool to facilitate the carjacking. *Id.* at 1002-03. The court explained that, although the movement of Cool was minimal, "even a temporary abduction can constitute an abduction for purposes of the [S]entencing [G]uidelines." *Id.* at 1003. The Fourth

Circuit found that this temporary abduction facilitated the offense because it "delayed notification of the police, and assisted [the defendant] in making a speedier escape." *Id.*

Just like the defendant in *Nale*, Petitioner abducted someone to prevent them from calling for help. Indeed, the record makes clear that Petitioner "initially approached Stark because he was afraid that Stark might hit a panic button." R.8. After Stark told Petitioner that he needed his medication, which he kept "in his locker in the back room," Petitioner did *not* order Stark to stay put while Petitioner grabbed the medication; Petitioner "forced Stark to lead him into the back room," away from the suspected panic button. R.8. Indeed, just as the defendant in *Nale* abducted Cool to prevent him from calling the police, so too did Petitioner abduct Stark to move him away from the suspected panic button. When, as here, a robber abducts someone to allow them to complete their crime, the abduction was committed in furtherance of the robbery.

In *United States v. Archuleta*, the Tenth Circuit held that forcing bank employees into a bank's vault was an abduction committed "to further the commission of the bank robbery." 865 F.3d at 1288-89. The court explained that the defendant abducted the bank manager and a teller because "two employees were needed to access the vault." *Id.* at 1289. Thus, without the two employees, the defendant could not access the money he sought to steal, such that their abduction was "intended . . . to further the commission of the bank robbery." *Id.*

Just as in *Archuleta*, the Petitioner abducted someone (Stark), to enable him to find the money he wanted to steal. Whereas in *Archuleta* the defendant abducted bank employees so that he could access the vault, here, Petitioner abducted Stark because he needed Stark to tell him where the store kept its money. Petitioner argued below that he moved Stark to the back room so Stark could take his medication. R.8. This point is of no help to Petitioner. To the extent Petitioner forced Stark to the back room "so that he could take his medication," Petitioner did so to enable

Stark to answer his question: "Where is the cash?!" R.6. Indeed, when Petitioner initially asked Stark where the store kept its cash, Stark could not answer because he was "having a panic attack" and "couldn't think straight." R.6. Just as Petitioner had "predicted," Stark was the only employee at the store, and accordingly, Stark was the only person who could tell him where the store kept its cash.[4] R.4. It was only *after* Petitioner realized Stark's panic attack prevented him from revealing the location of the cash that Petitioner forced Stark to retrieve his medication. Because (1) Stark needed his medication to tell Petitioner where the money was, and (2) Stark kept his medicine "in his locker in the back room," Petitioner needed Stark to go to the back room if he ever wanted to find the money. Indeed, immediately after Stark took his medication, Petitioner again demanded to know where the store kept its cash. R.6. Although Petitioner did not know the store kept its cash in the back room, Petitioner did force Stark into the back room to *enable* Stark to reveal the location of the money. Thus, just as the defendant in *Archuleta* needed to abduct two employees to access the vault and complete his robbery, here, Petitioner needed to abduct Stark enable him to reveal the location of the store's cash.

Hence, regardless of whether Petitioner forced Stark from the sales floor and into the back room to prevent Stark from pressing a panic button *or*, as Petitioner argues, to allow Stark to take his medication, Petitioner abducted Stark to facilitate the robbery. Thus, this Court should affirm the circuit court's ruling that Petitioner abducted Stark in furtherance of a robbery.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Thirteen Circuit in all respects.

[4] Unless, of course, it is to be believed that customers are aware of T-Mobile's financial security plans.

Applicant Details

First Name	**John**
Last Name	**Witczak**
Citizenship Status	**U. S. Citizen**
Email Address	**jbwitcza@iu.edu**
Address	**Address** Street **1551 S. Henderson St. APT 301** City **Bloomington** State/Territory **Indiana** Zip **47401** Country **United States**
Contact Phone Number	**3174314449**

Applicant Education

BA/BS From	**Wabash College**
Date of BA/BS	**May 2021**
JD/LLB From	**Indiana University Maurer School of Law** **http://www.law.indiana.edu**
Date of JD/LLB	**May 6, 2024**
Class Rank	**5%**
Law Review/Journal	**Yes**
Journal(s)	**Indiana Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Sherman Minton Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Tomain, Joseph
jtomain@indiana.edu
Sanders, Steve
stevesan@indiana.edu
812-855-1775

This applicant has certified that all data entered in this profile and any application documents are true and correct.

John Witczak

1551 S. Henderson Street Apt. 301, Bloomington, IN 47401
jbwitcza@iu.edu | (317) 431-4449 | linkedin.com/in/johnbernardwitczak

Judge Michael Brennan

U.S. Courthouse and Federal Building
517 E. Wisconsin Avenue, Room 618
Milwaukee, Wisconsin 53202

May 11, 2023

Dear Judge Brennan,

I just finished my 2L year at the Indiana University Maurer School of Law and am writing to express my strong interest in the one-year judicial clerkship in your chambers. My interest in this clerkship stems from my passion for legal research & writing, oral advocacy, and the administration of justice through the court system. I firmly believe that I can be an invaluable asset to you during the 2024-2025 year.

My greatest strength is my work ethic. I make decisions carefully and when I decide to do something, I see it through. I believe my law school accomplishments thus far demonstrate this quality. Overall, my time in law school has helped me sharpen a number of relevant skills, including time-management, attention to detail, copy editing, and verbal communication. It is my sincere conviction that the diligence, industry, and natural passion for legal analysis that I have demonstrated in law school would be immediately useful to you and your work.

Research and writing are two of my best abilities, and I have been doing both at a high level for several years. Prior to law school, I was a staff writer for my undergraduate paper before serving as the Copy Editor. In law school, I have excelled in and enjoyed writing-intensive courses. My Moot Court partner and I earned brief-writing honors, and last semester I received an "A" in a seminar class for which I wrote a paper discussing the relative strengths and weaknesses of both living constitutionalism and originalism. This semester, I am taking a course on appellate advocacy, and a portion of my final brief is included in this application as a writing sample. In short, I am an experienced researcher and writer who genuinely enjoys getting into the weeds and wrestling with ideas, organization, and arguments. Implementing these skills in your chambers would be a dream come true.

In all, I can't express my interest strong enough and hope to discuss this position with you sometime soon.

Thank you for your consideration,

John Witczak

John Witczak

1551 S. Henderson Street Apt. 301, Bloomington, IN 47401
jbwitcza@iu.edu | (317) 431-4449 | linkedin.com/in/johnbernardwitczak

EDUCATION

Indiana University Maurer School of Law, Bloomington, IN May 2024
J.D. Candidate, GPA: 3.822 (Top 5%)

- Top Grade in Contracts and Torts
- Moot Court Finalist (Brief Writing & Oral Advocacy Honors)
- Indiana Law Journal Associate

Wabash College, Crawfordsville, IN May 2021
B.A. in History, Minor in Business, GPA: 3.903, *Summa Cum Laude*

PROFESSIONAL EXPERIENCE

Kirkland & Ellis, Chicago, IL May 2023 – July 2023
Summer Associate

- Accepted position in the litigation practice area for the summer of 2023

Barnes & Thornburg, Indianapolis, IN May 2022 – July 2022
Summer Associate

- Conducted legal research into a wide variety of practice areas, including Mass Torts, Labor and Employment, and White-Collar Defense
- Wrote, edited, and verbally presented legal memoranda in order to synthesize complex case law and statutory authority into easily digestible work product
- Collaborated with partners, associates, and fellow summer associates on long-term research projects while sharpening teamwork, communication, and interpersonal abilities

Wabash College, Crawfordsville, IN August 2019 – May 2021
Peer Career Advisor

- Read, edited, and approved 20+ peer résumés and cover letters weekly while using customer service skills to provide a friendly and effective working environment

PROFESSIONAL DEVELOPMENT

Moot Court, Bloomington, IN September 2022 – November 2022
Finalist

- Advanced to the final round of the Sherman Minton Moot Court Competition while honing skills of oral advocacy and extemporaneous argumentation
- Awarded brief writing honors after effectively communicating and working with partner to compose a focused and persuasive brief on two hypothetical questions of constitutional law
- Received oral advocacy honors by implementing legal, rhetorical, and interpersonal skills in both in-person and Zoom environments

Indiana Law Journal, Bloomington, IN
Associate August 2022 – Present

- Meticulously check the grammar, syntax, and Bluebook citations of scholarly articles while collaborating with fellow associates and managers in order to ensure required quality of final work product

Interests

Liverpool F.C. | Creative Writing | 1960's Music | History

Academic Record of **Witczak, John B.**

Graduated from **Wabash College** on 5/1/2021. Major: History.

Student ID: 0003453317

J.D. in progress

Indiana University
Maurer School of Law -- Bloomington

I Semester 2021-2022

Legal Res & Writing	Goodman, S.	B542	2.0	A-
Legal Profession	Wallace, S.	B614	1.0	S
Contracts	Tomain, J.	B501	4.0	A+*
Torts	Gjerdingen, D.	B531	4.0	A*
Civil Procedure	Janis, M.	B533	4.0	A-

Dean's Honors Sem 54.20/14=3.87 `Cum 54.20/14.0=3.871 Hours passed 15.0

II Semester 2021-2022

Legal Research & Writing	Goodman, S.	B543	2.0	A-
Property	Stake, J.	B521	4.0	A-
Constitutional Law I	Williams, D.	B513	4.0	A
The Legal Profession	Krishnan, J.	B614	3.0	A-
Criminal Law	Hoffmann, J.	B511	3.0	A-

Dean's Honors Sem 60.40/16=3.78 `Cum 114.60/30.0=3.820 Hours passed 31.0

I Semester 2022-2023

Indiana Law Journal	Sanders, S.	B674	1.0	S
^Appellate Advocacy	McFadden, L.	B642	1.0	S
Corporations	Kovvali, A.	B653	3.0	A
Employment Law	Dau-Schmidt, K.	B719	3.0	A
*S Const Interpretation	Sanders, S.	L799	3.0	A
Con Law II	Williams, S.	B668	3.0	A-

Dean's Honors Sem 47.10/12=3.93 `Cum 161.70/42.0=3.850 Hours passed 45.0

II Semester 2022-2023

Secured Transactions	Hughes, S.	B672	3.0	B+
Indiana Law Journal	Sanders, S.	B674	1.0	S
Civil Procedure II	Wallace, S.	B534	3.0	A
Evidence	Orenstein, A.	B723	4.0	A-
#^Appellate Pract & Proc	Castanias, G.	B671	2.0	A

Dean's Honors Sem 44.70/12=3.73 `Cum 206.40/54.0=3.822 Hours passed 58.0

Hours Incomplete 0.0

Grade and credit points are assigned as follows: A+ or A = 4.0; A- = 3.7; B+ = 3.3; B = 3.0; B- = 2.7; C+ = 2.3; C = 2.0; C- = 1.7; D = 1.0; F = 0. A "C-" grade in our grading scheme reflects a failing grade and no credit. An "F" is reserved for instances of academic misconduct. At graduation, honors designation is as follows: Summa Cum Laude - top 1%; Magna Cum Laude - top 10%; Cum Laude - top 30%. For Dean Honors each semester (top 30% of class for that semester) and overall Honors determination, grades are not rounded to the nearest hundredths as they are on this record. Marked (*) grades are Highest Grade in class. Since this law school converts passing grades ("C" or higher) in courses approved from another college or department into a "P" (pass grade), for which no credit points are assigned, there may be a slight discrepancy between the G.P.A. on this law school record and the G.P.A. on the University transcript. Official transcripts may be obtained for a fee from the Indiana University Registrar at the request of the student .

123017

*******THIS IS AN UNOFFICIAL TRANSCRIPT*******

Mr. John B. Witczak
612 S State Rd. 446 Apt 34B
Bloomington IN 47401-5831

Major(s): History
Minor(s): Business

BA - Bachelor of Arts Degree Awarded on 05/21

TERM	COURSE	DEPT	SEC	GRADE	ATT	EARN	GPA	TERM	CUM
18/TR	Transfer credit: Xavier University								
	Fys: Black Literature & Faith	FRT	100		1.00	1.00			
	Studies in Fiction	ENG	124		1.00	1.00			
	Asia Under the Japanese Empire	HIS	163		1.00	1.00			
	Ethics As Intro to Philosophy	PHI	100		1.00	1.00			
	Elementary Spanish I	SPA	101		1.00	1.00			
	Introduction to Public History	HIS	290		1.00	1.00			
	Transfer credit: Ivy Tech Community College - Bloomington								
	English Composition	ENG	111		1.00	1.00			
	Introduction to Psychology	PSY	101		1.00	1.00			
	World Civilization II	HIS	112		1.00	1.00			
	Transfer credit:								
		FRC			1.00				
					10.00	10.00	0.000	0.000	0.000
18/FA	Princ of Economics	ECO	101	A	1.00	1.00	4.000		
	Ancient Hist:Greece	HIS	211	A	1.00	1.00	4.000		
	Introduction to Theater	THE	101	A	1.00	1.00	4.000		
	Public Speaking	RHE	101	A	1.00	1.00	4.000		
					4.00	4.00	16.000	4.000	4.000
	Dean's List								
19/SP	Economic Approach With Excel	ECO	251	A	0.50	0.50	2.000		
	The Vietnam War	HIS	340	A	1.00	1.00	4.000		
	Mathematics of Games & Sports	MAT	106	A	1.00	1.00	4.000		
	Philosophy of Commerce	PHI	218	A	1.00	1.00	4.000		
	U.S. and the World Since 1945	HIS	243	A	1.00	1.00	4.000		
					4.50	4.50	18.000	4.000	4.000
	Dean's List								
19/FA	Religion and Cognitive Science	REL	275	A	0.50	0.50	2.000		
	Human Rights in Hist Imaginatn	HIS	300	A	1.00	1.00	4.000		
	Bus & Tech Writing	ENG	411	A-	1.00	1.00	3.670		
	Elementary Spanish I	SPA	101	B+	1.00	1.00	3.330		
	Financial Accounting	ACC	201	A-	1.00	1.00	3.670		
					4.50	4.50	16.670	3.704	3.898
	Dean's List								
20/SP	Financ Markets & Institutions	ECO	262	A	1.00	1.00	4.000		
	Phil & Craft of Hist	HIS	497	A-	1.00	1.00	3.670		
	Elem Symbolic Logic	PHI	270	A	1.00	1.00	4.000		
	Introduction to Existentialism	PHI	144	A	1.00	1.00	4.000		
					4.00	4.00	15.670	3.918	3.902
	Dean's List								
20/FA	Human Biology	BIO	101	A-	1.00	1.00	3.670		

*** Continued ***

*******THIS IS AN UNOFFICIAL TRANSCRIPT*******

Mr. John B. Witczak
612 S State Rd. 446 Apt 34B
Bloomington IN 47401-5831

Major(s): History
Minor(s): Business

BA - Bachelor of Arts Degree Awarded on 05/21

TERM	COURSE	DEPT	SEC	GRADE	ATT	EARN	GPA	TERM	CUM
	Senior Seminar	HIS	498	A	1.00	1.00	4.000		
	Intro to Amer Govt & Politics	PSC	111	A	1.00	1.00	4.000		
	History Christianity to Reform	REL	171	A	1.00	1.00	4.000		
	Senior Capstone	BUS	400	CR	0.00	0.00	0.000		
					4.00	4.00	15.670	3.918	3.905
	Dean's List								
21/XM	Comprehensive Exam	HIS		DIS					
21/SP	Management Accounting	ACC	202	A-	1.00	1.00	3.670		
	Survey of Biochemistry	CHE	106	A	1.00	1.00	4.000		
	Introduction to Film	THE	104	A	1.00	1.00	4.000		
					3.00	3.00	11.670	3.890	3.903
	Dean's List								
	Summa Cum Laude								
	Class Rank: 9/172								

DEGREE EARNED 05/21
BA Bachelor of Arts

TOTALS: CRED.ATT = 34.00 CRED.CPT = 34.00 CRED.GPA = 24.00 GRADE.PTS = 93.680 GPA = 3.903

A Wabash College electronic transcript is official only if it is certified by the National Student Clearinghouse

*** End of Record - Printed on 07/31/21 ***

May 11, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

John Witczak would make for an exceptional clerk in your chambers. I know John because he was a student in my first-year Contracts course in the Fall 2021 semester. John demonstrated an acute attention to detail, intellectual rigor, excellent preparation, a deep knowledge of the relevant caselaw, and an ability to skillfully analyze competing conceptions of the law's proper application. John excelled on the anonymously-grades final exam, which served as 100% of the course grade. Indeed, John earned the best grade in the class.

In addition to getting to know John in the classroom, I also observed him compete in the final round of the law school's competitive internal Moot Court competition. Once again, John displayed his high level of ability and preparation. He showed an ability to think on his feet, distill law and fact into persuasively digestible talking points, and perform calmly under pressure. In all, John's abilities and experiences make me confident that he would be a valuable asset to your chambers.

Finally, it is clear to me that John is interested in a clerkship for all of the right reasons. John is interested in serving as a judicial clerk to better understand how justice is administered and playing a role in serving the public through his assistance to your chambers in analyzing complex issues through research and writing. I highly recommend John Witczak and believe he will be a wonderful addition to your chambers.

If you have any questions or comments, please contact me.

Respectfully,

Joseph A. Tomain
Senior Lecturer in Law
Director Cybersecurity & Information Privacy Law Program
Senior Fellow, Center for Applied Cybersecurity Research
Indiana University Maurer School of Law

May 11, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am very pleased to provide a letter of recommendation for John Witczak, who has applied for a clerkship in your chambers.

My knowledge of John comes primarily from his membership in my Fall 2022 seminar on Constitutional Interpretation. This seminar canvassed the major theories of how best to give meaning to the Constitution's text and principles. We covered various approaches to (and critiques of) both originalism and the "living Constitution," as well as Ronald Dworkin's "moral reading" approach, Adrian Vermeule's "common good constitutionalism," and some other related topics such as Alexander Bickel's writing on the countermajoritarian difficulty. Each student wrote a paper on a topic of their choice related to the seminar's concerns. I required both a first draft, which I discussed in individual conferences with each student, and a final draft.

After reading John's first draft, I encouraged him to think seriously about clerking, because his writing was very clear, direct, logically organized, and well-reasoned.

John's argument was that we should make the constitutional amendment process easier, in order to reduce the stakes of judicial interpretation of old and often ambiguous constitutional text. Doing so, he argued, would "alleviate the tension between proper adherence to the Constitution, which is originalism's strength, and allowing the country to move forward in line with its contemporary values, which is living constitutionalism's strength." More so than many other papers in the class, John's topic and argument were original; they nicely combined theory and engagement with current issues. His research was strong. John was also very receptive to the feedback and suggestions I provided. His final paper was one of the seminar's very best.

Beyond his writing abilities, John presents an extremely strong profile for a clerkship. Academically he is ranked in the top 2% of his class (which would put him either third or fourth in a class of 189 students). He is taking a strong, litigation-oriented curriculum. He's on law review and was a finalist in our internal moot court competition. He summered last year with Barnes & Thornburgh, a top firm in Indianapolis, and this summer will be with Kirkland & Ellis in Chicago.

John has demonstrated that he can excel at the highest levels. He has all the makings of an outstanding judicial clerk – indeed, he is one of our very strongest clerkship candidates this year. I am pleased to recommend him very highly. Thank you for considering him. Please do not hesitate to contact me (stevesan@indiana.edu; 812-855-1775) if I may provide any additional information.

Yours sincerely,

Steve Sanders
Professor of Law
Indiana University Maurer School of Law

John Witczak

1551 S. Henderson Street Apt. 301, Bloomington, IN 47401
jbwitcza@iu.edu | (317) 431-4449 | linkedin.com/in/johnbernardwitczak

Writing Sample

This is a portion of a brief written for Appellate Practice and Procedure, a course I am currently enrolled in. The facts of the case are these: Golden Gauges, L.P. (Golden Gauges) and Gol-Darn Gags, Inc. (Gol-Darn) entered into a private agreement to resolve a dispute over the two companies' very similar logos. The Agreement specified that Gol-Darn was to change both the color scheme and typeface of its logo. Gol-Darn, after hiring non-party consultants Image-Nation to oversee the alterations, did so, but the changes were extremely minimal and led to a new logo that continued to closely resemble Golden Gauges's logo. Golden Gauges moved for and was granted a preliminary injunction against Gol-Darn, which mandated that Gol-Darn alter its logo so as to comport with the spirit of the two parties' agreement. Crucially, though, the district court also named and enjoined Image-Nation.

As counsel for Image-Nation, I am appealing the injunction. The statement of the issue in the case is this: "Whether, under F.R.C.P. 65(d)(2)(C), a non-party may be enjoined by—rather than bound by—a preliminary injunction resulting from proceedings in which the non-party was not heard." Due to length concerns, I have omitted the cover page, jurisdictional statement, statement of the issue, statement of the case, and the second half of my argument.

SUMMARY OF ARGUMENT

The district court exceeded its authority under Fed. R. Civ. P. 65(d)(2)(C) by enjoining non-party Image-Nation. There is no support—in either a relevant statute or the pertinent caselaw—for the enjoining of a non-party that was not formally involved in the proceedings that led to the issuance of the disputed injunction. In fact, the plain text of Rule 65 and the overwhelming majority of cases—including those of this Court—make clear that non-parties to a suit cannot be enjoined. The district court, in actually enjoining non-party Image-Nation, ventured far outside the bounds that injunctive relief affords.

There are several legal errors in the district court's reasoning that call for the vacation of the injunction as it pertains to Image-Nation. First, as stated immediately above, non-parties to a suit simply cannot be enjoined. Second, the mere presence of Image-Nation's attorneys in the courtroom during the injunction hearing did not render Image-Nation a party to the suit. Third, the signing of a form contract and the exchange of $27,500 did not morph Image-Nation into a subsidiary of Gol-Darn. Fourth, a non-party cannot "aid and abet" nor act "in concert" with a party until *after* the injunction has been issued. Fifth, Image-Nation is not and was never "legally identified" with Gol-Darn, and thus cannot be in "privity" with Gol-Darn. Sixth, and finally, no legal authority allows for the enjoining of a non-party from engaging in activities wholly independent of a named party, which the district court's ban on Image-Nation's taking new business effectively does. For the above reasons, this Court should vacate the district court's injunction to the extent it purports to enjoin non-party Image-Nation.

STANDARD OF REVIEW

The grant or denial of a preliminary injunction will not be disturbed absent a "clear abuse of discretion by the district court." *Joseph v. Sasafrasnet, LLC*, 734 F.3d 745, 747 (7th Cir. 2013)

(quoting *Moody v. Amoco Oil Co.*, 734 F.2d 1200, 1217 (7th Cir. 1984)). Questions of law are reviewed *de novo* and questions of fact are reviewed for clear error. *Id.* A district court "necessarily abuses its discretion when it commits an error of law." *United Air Lines, Inc. v. Int'l Ass'n of Machinist & Aerospace Workers, AFL-CIO*, 243 F.3d 349, 361 (7th Cir. 2001).

ARGUMENT

I. The District Court Did Not Have Authority to Enjoin Image-Nation Because Non-Parties to a Suit Cannot Be Enjoined

Fed. R. Civ. P. 65(d)(2)(C), the rule on which the district court relied in enjoining non-party Image-Nation, pertains only to those persons who may be *bound* by an injunction; it does not set forth the rules dictating those persons who may be explicitly *enjoined* by an injunction. The portion of the Rule reads that "[t]he order binds only . . . the parties; the parties officers, agents, servants, employees, and attorneys; and other persons who are in active concert or participation with anyone [just] described . . . ." FED. R. CIV. P. 65(d)(2)(A)–(C). A different portion of the Rule dictates that "[t]he court may issue a preliminary injunction only on notice *to the adverse party*." FED. R. CIV. P. 65(a)(1) (emphasis added). Thus, the Rule expressly differentiates between those against whom an injunction may be issued—which is to say a party that may be enjoined—and those who may be bound by an injunction despite their not being enjoined. The district court failed to heed this distinction, though, and explicitly *enjoined* Image-Nation based on reasoning that is germane only to the issue of whether a person may be *bound* by an injunction.

The Supreme Court's caselaw comports precisely with this reading of Rule 65. Two centuries ago, the Supreme Court balked at the issuance of an injunction because "it enjoin[ed] persons not parties to the suit." *Scott v. Donald*, 165 U.S. 107, 117 (1897). The Court went on to say that "we do not think it comports with well-settled principles of equity procedure to include

[non-parties] in an injunction in a suit in which they were not heard or represented, or to subject them to penalties for contempt in disregarding such an injunction." *Id.* This protection of non-party rights has only strengthened over time, with the Supreme Court going so far as to say, in the context of an injunction enjoining a non-party, that it is "elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1940) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940)). Affirming the district court's decision to enjoin Image-Nation would undercut the clear language of Rule 65 as well as the overwhelming weight of Supreme Court caselaw.

A. Image-Nation was neither a party to the suit nor a subsidiary of Gol-Darn

The district court's order relies on two errors of law to support its enjoining of Image-Nation. The first error is the conclusion that, by being present in the courtroom during the hearing, subscribing to the case's ECF reports, and consulting with Gol-Darn's lawyers, Image-Nation had "opportunity to be heard" sufficient enough to render it amenable to an injunction. Mem. Order 6. The second legal error is the casting of Image-Nation as a "subsidiary" of Gol-Darn based on the form contract the two parties signed, the top of which included the phrase: "Image-Nation: Your Branding Department." *Id.* at 5. Both of these conclusions stand in direct opposition to Supreme Court and Seventh Circuit caselaw.

The limited and tangential involvement that Image-Nation's attorneys had in the lower court proceeding does not render Image-Nation a party to the suit. While the district court did provide Image-Nation's representatives with the option to "examine witnesses and to make any statements or arguments to the court that they might like," Mem. Order 6, such an offer is insufficient to transform a non-party into a party. The Supreme Court spoke with clarity on this

subject when it stated that, "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat. Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 436. Here, all the district court offered Image-Nation was precisely such a "voluntary intervention," and Image-Nation was well within its rights to decline such action without losing its non-party status. Indeed, "[u]nless duly summoned to appear in a legal proceeding, a person not privy may rest assured that a judgment recovered therein will not affect his legal right." *Id.* at 441. The district court gave no such summons to Image-Nation, yet it went on to affect Image-Nation's legal rights by treating it as a party to the suit and subsequently enjoining it. This action by the district court was in error.

With respect to the district court's finding that Image-Nation is in effect a "subsidiary" of Gol-Darn, *Zenith Radio* is helpfully analogous and demonstrates the district court's error. In *Zenith*, Hazeltine was the parent organization of HRI, the latter of which was the named party in the case. 395 U.S. at 109. During the litigation, defendant Zenith and plaintiff HRI stipulated to the court that "for purposes of this litigation [HRI] and its parent Hazeltine Corporation will be considered to be one and the same company." *Id.* However, the stipulation was signed only by HRI's attorney who—despite being an agent of Hazeltine—did not purport to be signing the stipulation on Hazeltine's behalf. *Id.* at 110. Based on this stipulation, the trial court later named and enjoined Hazeltine in the injunction, viewing the stipulation "as binding on Hazeltine, as equivalent to an entry of appearance, or as consent to entry of judgment against it." *Id.*

On appeal, the Supreme Court squarely rejected the trial court's analysis and held that the injunction, as applied to Hazeltine, was improper. The Court noted that "Hazeltine was not named as a party, was never served and did not formally appear at trial." *Id*. With regard to the stipulation, the Court did not consider it to be at all indicative of Hazeltine's appearing in court

or acquiescing to judgment. *Id.* Crucially, the Court went even further by outlining that, even if the question of whether Hazeltine and HRI were *alter egos* was litigated and answered in the affirmative, such a determination would be binding only on HRI until the trial court had "jurisdiction over Hazeltine." *Id.* at 111. The only method by which Hazeltine could be enjoined, according to the Court, was by having "its day in court on the question of whether it and [HRI] should be considered the same party for purposes of this litigation." *Id.* In essence, the Supreme Court held that, for the purposes of Rule 65, a non-party cannot be deemed amenable to an injunction based on a parent-subsidiary relationship with a named party—despite the existence of that relationship being uncontested—until the non-party has actually appeared and argued before the trial court.

In applying *Zenith*, this Court has consistently protected non-parties from being enjoined. In *Kenseth v. Dean Health Plan*, the claimant Kenseth asked the district court to enjoin "subsidiary or parent corporations of [the defendant] from collecting fees from her." 722 F. 3d 869, 890 n.7 (7th Cir. 2013). This Court declined to direct such action, noting that, "in general, a court may not enter orders against nonparties." *Id.* This Court then concluded that the district court "may not enjoin these nonparties." *Id.* In *Lake Shore Asset Management v. Commodity Futures Comm'n*, this Court observed that an injunction against a named party "binds all those acting in concert with it—which means other members of the corporate group." 511 F.3d 762, 766 (7th Cir. 2007). However, the Court in *Lake Shore* was quick to articulate that "it does not follow that a litigant's affiliates may be named in an injunction." 511 F.3d at 766. Accordingly, the Court held that the named defendant "must be the sole addressee of the injunction" because "none of [the non-party affiliates of the defendant have] been served with process and given an

opportunity to present evidence. That is essential before any enforcement action may be taken against a non-litigant." *Id.* at 767.

In this case, the district court found that Image-Nation is Gol-Darn's *alter ego* and subsidiary despite Image-Nation never being served with process or having its day in court. As such, the finding cannot stand and should not be used to support the enjoining of Image-Nation. Both *Zenith* and this Court's precedent are clear: a non-party cannot be enjoined as a subsidiary or *alter ego* until that non-party has been served with process and actually made its case in court. These mandatory procedures have simply not taken place in this case, and no findings in the district court's order can overcome this blatant fact. It is of no moment that Image Nation's lawyers conferred with those of Gol-Darn, that Image Nation subscribed to the case's ECF reports, or that the district court invited Image-Nation to be heard. Unless and until Image-Nation is served and formally has its day in court, the holdings of both this Court and the Supreme Court mandate vacating the injunction as it applies to Image-Nation.

Relatedly, the district court's finding that Image-Nation is the subsidiary or *alter ego* of Gol-Darn lacks sufficient evidence. In *Zenith*, it was undisputed that HRI was the "wholly owned subsidiary of Hazeltine," 395 U.S. at 104, yet such a business relationship was insufficient to treat Hazeltine as a party for purposes of the litigation. In this case, the district court offers two unconvincing pieces of evidence to support Image-Nation being Gol-Darn's corporate subsidiary. The first piece of evidence is the inclusion of Image-Nation's slogan atop the parties' form contract. The slogan reads: "Image-Nation: Your Branding Department." Mem. Order 5. The second piece of evidence is that Image-Nation agreed to "take control" over Gol-Darn's branding image. *Id.* Such "evidence" is completely unavailing and fails entirely to support—let alone prove—a parent-subsidiary relationship between Gol-Darn and Image-Nation. Even the

district court appears unconvinced by its own description of Image-Nation and Gol-Darn's relationship, as the court's injunction refers to Image-Nation's "other clients," *Id.* at 7, directly implying that Gol-Darn is not its parent but is instead what it actually is: a client that paid $27,500 for Image-Nation's services. However, as *Zenith* and *Lake Shore* make clear, even if Image-Nation was in fact a subsidiary of Gol-Darn—which it is not—such a business relationship is legally insignificant until Image-Nation has had its day in court to argue the issue. Because Image-Nation has *not* had its day in court, the district court was without authority to enjoin Image-Nation based on its finding that it is a subsidiary and *alter ego* of Gol-Darn.

B. The district court failed to demonstrate that Image-Nation is "in privity" with Gol-Darn such that it is amenable to being enjoined

The district court supported its decision to enjoin Image-Nation in part on a finding that Image-Nation and Gol-Darn are in "contractual privity." Mem. Order 7. The issue of privity is relevant because the common law generally allows for "an injunction [to be] enforced against a nonparty 'in privity' with an enjoined party.'" *Nat'l Spiritual Assembly of Baha'is of U.S. Hereditary Guardianship v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010) (citing *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 179–80 (1973)). However, as the preceding quote demonstrates, the issue of privity is relevant only to the question of whether an un-enjoined party may be *bound* by an already existent injunction; privity is not relevant to whether a non-party to a suit may itself be *enjoined*. This is because "[t]he concept of privity . . . both in preclusion doctrine and in the law of injunctions—is ultimately bounded by due process, which starts from a presumption that each person has a right to her day in court." *Id.* at 849 (internal quotation marks omitted). As set forth above, Image-Nation has not had its day in court with respect to the injunction in dispute, and thus the presence or absence of privity between Image-Nation and Gol-Darn does not affect the district court's inability to enjoin

Image-Nation. Further, even if the presence of privity did allow a district court to enjoin a non-party—which it does not—the district court did not even attempt to establish the presence of privity in the manner mandated by Seventh Circuit and Supreme Court precedent.

Regarding the issuance of injunctions, "privity has come to be seen as a descriptive term for designating those with a sufficiently close identity of interests to justify . . . the enforcement of an injunction against a nonparty." *Id.* (citation omitted). This kind of privity requires the nonparty to be "legally identified" with the enjoined party. *Id.* at 853 (discussing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2nd Cir. 1930) (L. Hand, J.) and *G.&C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29 (1st Cir. 1980)). "Legal identity" typically refers to successors and assigns, though it can also apply to other nonparties provided that "the evidence establishes a very close identity of interest and such significant control over the organization and the underlying litigation that it is fair to say that the nonparty had its day in court when the injunction was issued." *Id.* A district court relying on privity via successors and assigns "in an enforcement order of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945).

While concluding that Image-Nation was in "contractual privity" with Gol-Darn, and thus reasoning that Image-Nation was legitimately subject to being enjoined, the district court did not even attempt to demonstrate that "privity," as defined by the above caselaw, exists in this case. Nowhere in the district court opinion is either the word "successor" or "assign." *See* Mem. Order. Similarly, the district court failed to analyze whether Image-Nation in any way "controlled" the litigation in the court below or whether its identity of interest with Gol-Darn is such that Image-Nation could fairly be said to have had its day in court. *See* Mem. Order. In fact, the word "privity" is used only once, and the district court's entire basis for introducing the

doctrine seems to be the existence of the contract between Image-Nation and Gol-Darn. *Id.* at 7. By failing to engage—even once—with the relevant legal precedent before concluding that Image-Nation and Gol-Darn are in "privity," the district court violated Fed. R. Civ. P. 52(a)(2), as it did not "state the findings and conclusions that support its action." Due to the utter lack of either facts or law in the district court order that support a finding of "privity" between Image-Nation and Gol-Darn, and the subsequent violation of Rule 52, this Court should vacate the injunction as it applies to nonparty Image-Nation because it has not been shown to be in privity with the named party.

[End of Writing Sample]

John Witczak

1551 S. Henderson Street Apt. 301, Bloomington, IN 47401
jbwitcza@iu.edu | (317) 431-4449 | linkedin.com/in/johnbernardwitczak

Second Writing Sample

This is a portion of a brief written for the 2022 Sherman Minton Moot Court Competition. The issue here involves whether a police officer may warrantlessly view the contents of a laptop folder if a private citizen voluntarily provides the officer access to such a folder. Specifically, the question is whether an officer may view the contents of a previously un-opened subfolder within an already opened "mother folder" that the private citizen has provided. I represented the government in arguing that such an inspection is legal under the "private search doctrine" of the Fourth Amendment.

ARGUMENT

I. The trial court properly held that Officer Jenkins's search of the "Halloween Hijinx" sub-folder did not violate Gates's fourth amendment rights because the search was legal under the private search doctrine.

The Fourth Amendment proscribes, in part, governmental agents from engaging in "unreasonable searches" of a person's property. U.S. Const. amend. IV. A "search" implicating the Fourth Amendment "occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 446 U.S. 109, 113 (1984). The fundamental purpose of the amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. U.S.*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 528 (1967)). Crucially, Fourth Amendment protections do not extend to searches or seizures undertaken by private actors—regardless of reasonableness—when those private actors operate without government knowledge or participation. *Jacobsen*, 446 U.S. at 113. Once a private actor frustrates the property owner's original expectation of privacy in this way, "the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id.* at 117. This exception to Fourth Amendment protection is referred to as the "Private Search Doctrine."

Officer Jenkins's search neither frustrated Gates's reasonable expectation of privacy nor exceeded the scope of Chase's private search. As such, this Court should affirm the trial court's holding that Gates's Fourth Amendment rights were not violated and that her motion *in limine* to suppress evidence obtained through Jenkins's search was properly denied.

A. Chase's private search of Gates's laptop frustrated any reasonable expectation of privacy that she may have had in the laptop's "Holiday Photos" mother folder.

For the "private search doctrine" to apply, the private actor's search must have been without the government's knowledge or participation. *Jacobsen*, 446 U.S. at 113. Lack of

government knowledge or participation can be demonstrated by a showing that the original search took place before any contact with law enforcement. *United States v. Suellentrop*, 953 F.3d 1047, 1050 (2020). If a search is deemed have been done without government involvement, then whatever was found during the private search may be warrantlessly inspected by law enforcement. *See Jacobsen*, 446 U.S. at 117; *Coolidge v. New Hampshire*, 403 U.S. 443, 489 (1971) ("[W]hen a third party provides the police with evidence that she obtained in the course of her own search, the police need not 'stop her or avert their eyes.'"). This is often referred to as frustrating the defendant's reasonable expectation of privacy. *Jacobsen*, 446 U.S. at 126. When such privacy expectations and interests are frustrated, the Fourth Amendment provides no protection. *Id.* Circuits, however, are split as to whether the government may view an item inside a container a private searcher has opened, if that private searcher has not inspected that particular item. *See, e.g., United States v. Fall*, 955 F.3d 363, 370 (4th Cir. 2020).

i. Chase was not acting in any governmental capacity when conducting the private search because he made no contact with law enforcement prior to undertaking the search.

The Supreme Court has made it clear that a search is "private" if the searcher is not an agent of the government and conducts it without either governmental knowledge or participation. *Jacobsen*, 446 U.S. at 113. The government may meet this burden of proof by proffering evidence that the searcher did not contact the government prior to undertaking the search. *See Suellentrop*, 953 F.3d at 1050. This rule is founded on the idea, announced by the Supreme Court, that the Fourth Amendment protects against and proscribes only "governmental action," and has no application to the conduct of a "private individual." *Jacobsen*, 446 U.S. at 113.

Finding whether or not a searcher was sufficiently distant from government, so as to render their search "private," is a quick and straightforward task. In *Suellentrop*, an acquaintance

of the defendant accessed the latter's smartphone—without permission—to make a call and browse Facebook. F.3d at 1048. After doing so, the acquaintance got "'nosey'" and began looking through the phone's contents. *Id.* Soon after doing so, the acquaintance found images depicting child pornography, and law enforcement was called shortly afterward. *Id.* The Eighth Circuit found that the search was private, as the acquaintance acted completely on his own when deciding to look through the defendant's phone. *Id.* at 1050. The defendant, though, argued that the acquaintance, by unlocking the phone and showing the police officer the images he had found, had acted "as an agent of the government." *Id.* The court rejected this line of thinking, finding that the "character of this second viewing is immaterial. [The acquaintance's] private search had already occurred, and the Fourth Amendment does not forbid the government to reexamine the same materials as long as agents go no further than the private search." *Id.*

The facts in this case are analogous to *Suellentrop* and demonstrate that Chase's search was completely "private" and in no way implicated the Fourth Amendment. Chase testified that he originally went through Gates's laptop "to see if there was anything there that could explain why she was acting so strange," (R. 29), which is a completely personal motive and much like that of the acquaintance in *Suellentrop*. Further, Chase stated that he did not make contact with any governmental official until ten minutes *after* he had discovered the "Miss Demeanor" photo, which was when he called the police. (R. 29.) Officer Jenkins's testimony also supports this timeline of events, as he stated that, before he looked at the photos in question, Chase "explained that he found a photo of [Gates] wearing the [Miss Demeanor Sash]." (R. 35.) It is clear from these facts that Chase's original investigation was precisely the kind of "private" search that the Fourth Amendment does not protect against, and, as the Eighth Circuit pointed out, the second viewing is "immaterial" to the question of whether the original search was "private."

Suellentrop, 953 F.3d at 1050. As such, the record and case law make it abundantly clear that the district court correctly found that Chase's search fell under the "private search doctrine."

ii. Under the "container rule," Chase frustrated Gates's reasonable expectation of privacy in the "Holiday Photos" mother folder.

The circuits are split on the question of whether a governmental actor, when reviewing the findings of a private search, may review only the exact items the private searcher uncovered, or whether the governmental actor may undergo a more thorough search of all items in the "container" that the private searcher opened. The former category is the "narrow" view, which does not follow the "container rule," and the latter category is the "broad" view, which does follow the "container rule." The proponents of the narrow view generally agree that "since the Fourth Amendment is not implicated by a private search, it is not violated when the police merely review the same information that was discovered during the private search." *Fall*, 955 F.3d at 370. Under this line of reasoning, the government may view only the exact same items, on a one-to-one basis, that the private searcher viewed. *See United States v. Sparks*, 806 F.3d 1323, 1336 (11th Cir. 2015). The adherents of the broad view, however, find the one-to-one rule too limiting on law enforcement, and instead posit that "[i]n the context of a closed container search, this means that the police do not exceed the private search when they examine more items within a closed container than did the private searchers." *United States v. Runyan*, 275 F.3d 449, 463 (5th Cir. 2001). Specifically, courts adhering to the "container rule" find that "an individual's expectation of privacy in the contents of a container has already been compromised if that container was opened and examined by private searchers," meaning that police do not engage in a Fourth Amendment "search" when they examine items in the container. *Id.* at 465.

The "narrow" view uses flawed reasoning and curtails law enforcement's ability to both make use of the private search doctrine and efficiently administer justice. Following the

"narrow" view, the Eleventh Circuit in *Sparks* found that it would be inconsistent with the Supreme Court's holding in *Riley v. California*, 573 U.S. 373 (2014) to allow an officer to view a video a private searcher had not viewed, despite the video in question being in the same folder "that the private citizen had opened and investigated." 806 F.3d at 1336. However, the *Sparks* court misread and misapplied *Riley*. For starters, *Riley* is about the incident-to-arrest doctrine, *not* the private search doctrine. 573 U.S. at 378. Secondly, the officer in *Riley* "went through" the entirety of the defendant's phone, 573 U.S. at 379, whereas, in *Sparks*, the officer only looked at one video the private searcher did not look at, and the video was in the same album as the other photos the private searcher *did* look at. 806 F.3d at 1332. Thus, the privacy concerns that led the Supreme Court to opine that "[t]reating a cell phone as a container whose contents may be searched" is "a bit strained" were not present in *Sparks*, due to the informationally confined and limited nature of a single digital album as compared to an entire cell phone hard drive.

The Sixth Circuit, like the Eleventh Circuit, also applies the "narrow" view of the private search doctrine. In *United States v. Lichtenberger*, the private searcher showed law enforcement "random" images and opened "several folders" from a laptop she had previously searched. 786 F.3d 478, 480 (6th Cir. 2015). At trial, the private searcher admitted that she "could not recall" if she showed the officer the same images she had previously seen, due to the number of photographs and folders she had originally inspected. *Id.* at 488. As a result, the court rejected the contention that a laptop is a "container" for the purposes of the container rule, noting that the "search of a laptop is far more intrusive than the search of a container" because of "the amount of data a laptop can hold." *Id.* After rejecting the application of the "container rule," and after noting that there was no immediate threat to government interests at the time the search occurred,

the court held that the officer exceeded the scope of the private search and that the evidence obtained from the search needed to be suppressed. *Id.* at 491.

The circuits that follow the "broad" view of the private search doctrine, the Fifth and Seventh Circuits, offer the better case law and correctly apply the container rule. In *Runyan*, the Fifth Circuit assumed "without deciding that computer disks are 'containers.'" 275 F.3d at 458. There, private searchers found several physical hard drives and zip drives containing child pornography. *Id.* at 453. The private searchers gathered all of the hard drives they could find, which included some that they had not inspected, and sent them to the police. *Id.* The court held that the police exceeded the scope of the private search when they viewed images off of hard drives the private searchers did not inspect at all. *Id.* at 465. Importantly, though, the Court also held that the police *did not* exceed the scope of the private search when they inspected hard drives the private searchers had already looked at, even if they, the police, viewed more photos off of those hard drives than the private searchers. *Id.* The court found that the defendant's "expectation of privacy" in the previously-searched hard drives had "already been compromised" by the private search, and that the Fourth Amendment was thus not implicated by governmental agents viewing additional photos found on the hard drives. *Id.* In the case of law enforcement viewing images off of hard drives that the private searchers had never inspected, the court held that it would only be permissible "if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside." *Id.* at 463. Lastly, the Court found that public policy strongly favors adopting the broad view and the container rule, noting that, if it did not do so, "[p]olice would thus be disinclined to examine even containers that had already been opened and

examined by private parties for fear of coming across important evidence that the private searchers did not happen to see and that would then be subject to suppression." *Id.* at 465.

The Seventh Circuit, in *Rann v. Atchison*, adopted the Fifth Circuit's application of both the "broad" private search doctrine and the container rule to digital media. 689 F.3d 832, 837 (7th Cir. 2012). The court found that *Runyan*'s holding

> strikes the proper balance between the legitimate expectation of privacy an individual retains in the contents of his digital media storage devices after a private search has been conducted and the "additional invasions of privacy by the government agent" that "must be tested by the degree to which they exceeded the scope of the private search."

Id. at 837 (quoting *Jacobsen*, 466 U.S. at 115). In the case, the court allowed application of the private search doctrine where authorities warrantlessly viewed the defendant's memory card and zip drive that had been sent to them by a victim of the defendant's sexual abuse. *Id.* at 838. Despite no official evidence that the victim had seen the contents of the digital media, the court held that the "police did not exceed the scope of the private searches performed by [the victim] and her mother when they subsequently viewed the images contained on the digital media devices." *Id.* at 837. Crucially, the court also stated that the police would not have exceeded the scope of the private search even if "the police more thoroughly searched the digital media devices than [the victim] and her mother did and viewed images that [the victim] and her mother had not viewed . . . ." *Id.* at 838.

This Court should adopt both the "broad" view of the private search doctrine and the container rule, as both doctrines safeguard defendants' fourth amendment rights while providing law enforcement with enough breathing space to efficiently and effectively make use of evidence brought to them by private citizens. In dealing with alleged unreasonable searches, it is paramount for courts to remember that "the critical inquiry under the Fourth Amendment is whether the authorities obtained information with respect to which the defendant's expectation of

privacy has not already been frustrated.'' *Runyan*, 275 F.3d at 461. This assertion is supported by the Supreme Court's findings in *Jacobsen*, where it stated that "once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." 446 U.S. at 117. In every case where a private searcher has accessed a digital folder belonging to a defendant, that defendant's expectation of privacy concerning the folder has been frustrated, and law enforcement should therefore be free to review the information without fear of having the evidence later be suppressed by a court.

Following this logic, it is clear that Gates had no expectation of privacy in the contents of the "Holiday Photos" mother folder after Chase conducted his private search. For starters, the "Holiday Photos" folder is a "container" which held the remaining four sub-folders, including the one labelled "Halloween Hijinx," which retained the photo of the Bill of Rights. This conclusion is supported by a number of factors, the first of which is the Supreme Court's definition of a container: "any object capable of holding another object." *New York v. Belton*, 453 U.S. 454, 460 n.4 (1981). Here, the "Holiday Photos" folder was an object which held the four other folders, and, following the container rule, Gates's expectation of privacy in everything the folder held was frustrated as soon as Chase opened it and found the first incriminating photo. Second, the Supreme Court's concern about giving police broad access to a nearly infinite supply of a defendant's information is not present here as it was in *Riley*. This is because *Riley* involved officers searching a defendant's *entire phone*, where this case involves an officer searching a *single folder* on a laptop, which happened to contain four sub-folders. Thus, the dictum in *Riley* stating that it is "a bit strained" to call a cell phone a container is irrelevant to a case with these facts. Third, caselaw from other circuits makes clear that Gates had no expectation of privacy in the "Holiday Photos" mother folder. Like the defendants in *Runyan* and *Atchison* who lost all

privacy interests in their digital hard drives after they were opened by private searchers, Gates lost her expectation of privacy in the folder when it was opened by Chase.

The Supreme Court provides further support for finding that Chase's private search frustrated Gates's expectation of privacy in the "Holiday Photos" mother folder. The Court in *Jacobsen* stated that the defendant in that case could have no expectation of privacy in a package because private searchers had unsealed it, examined it, and called governmental agents "for the express purpose of viewing [the package's] contents." 446 U.S. at 120. The same factors are present here: Chase unsealed the "Holiday Photos" folder by entering the password into Gates's laptop, Chase examined the content of the folder when finding the "Miss Demeanor" sash photo, and, lastly, Chase called the Arcadia police for the express purpose of viewing the contents of the "Holiday Photos" folder. Following the reasoning of the Supreme Court, Gates had no privacy interest in the folder after Chase's private search, and thus the Fourth Amendment could not have been implicated by Officer Jenkins's later viewing of the folder's contents.